

No. 16-17050

IN THE

**UNITED STATES COURT OF APPEALS**

FOR THE NINTH CIRCUIT

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PATRICIA HARDING MORRISON  
for the Estate of TOMMY MORRISON  
*Plaintiff & Appellant,*

v.

QUEST DIAGNOSTICS INCORPORATED  
JOHN HIATT  
DR. MARGARET GOODMAN  
NEVADA STATE ATHLETIC COMMISSION  
MARC RATNER  
*Defendants & Respondents.*

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**APPENDIX C: Tabs A,B,C.**

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**Contents:**

**Tabs:**

Motions Hearing-Sep.08,2016...	...	...	...	...	...	<b>A.</b>
Motions Hearing-Mar.01,2016...	...	...	...	...	...	<b>B.</b>
Motions Hearing-Sep.14,2015...	...	...	...	...	...	<b>C.</b>

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2:14-cv-01207-RFB-PAL

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF NEVADA

3

4 PATRICIA HARDING MORRISON, )  
 individually and in her ) Case No. 2:14-cv-01207-RFB-PAL  
 5 capacity as )  
 Executor/Administrator of ) Las Vegas, Nevada  
 6 the Estate of Tommy ) Thursday, September 8, 2016  
 Morrison, a deceased ) 10:00 a.m.  
 7 individual, )  
 ) MOTIONS HEARING  
 8 Plaintiff, )  
 )

9 vs.

10 QUEST DIAGNOSTICS,  
 INCORPORATED, a Nevada  
 11 domestic corporation; JOHN  
 HIATT, an individual; DR.  
 12 MARGARET GOODMAN, an  
 individual; NEVADA STATE  
 13 ATHLETIC COMMISSION, an  
 unknown business entity;  
 14 and MARC RATNER, an  
 individual,

15 Defendants.  
1617  
18 REPORTER'S TRANSCRIPT OF PROCEEDINGS

19 THE HONORABLE RICHARD F. BOULWARE, II,  
 20 UNITED STATES DISTRICT JUDGE

21 APPEARANCES: See Next Page

22 COURT REPORTER: Patricia L. Ganci, RMR, CRR  
 23 United States District Court  
 333 Las Vegas Boulevard South, Room 1334  
 24 Las Vegas, Nevada 89101

25 Proceedings reported by machine shorthand, transcript produced  
 by computer-aided transcription.

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1 LAS VEGAS, NEVADA; THURSDAY, SEPTEMBER 8, 2016; 10:00 A.M.

2 --oOo--

3 P R O C E E D I N G S

4 THE COURT: Please be seated.

5 COURTROOM ADMINISTRATOR: Now calling Patricia Harding  
6 Morrison versus Quest Diagnostics, Incorporated, et al., Case  
7 No. 2:14-cv-01207-RFB-PAL. This is the time for the hearing  
8 regarding motions pending before the Court.

9 Starting with counsel for defendants, please note your  
10 appearance for the record.

11 MS. CALDWELL: Your Honor, Faye Caldwell for Quest  
12 Diagnostics and John Hiatt.

13 MR. WEAVER: Good morning, Keith Weaver for Quest  
14 Diagnostics and John Hiatt.

15 MS. RAKOWSKY: Good morning, Your Honor. Vivienne  
16 Rakowsky for the Nevada Attorney's General Office on behalf of  
17 Nevada Athletic Commission, Dr. Margaret Goodman, and Marc  
18 Ratner.

19 THE COURT: Good morning.

20 MS. MORRISON: Good morning, Your Honor. My name is  
21 Patricia Harding Morrison, and I am the administrator and  
22 executor of the Estate for Tommy Morrison and the plaintiff in  
23 this case.

24 THE COURT: Good morning.

25 MS. MORRISON: Good morning.

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1 THE COURT: So we are here on multiple motions in this  
2 case. By my count, last count, I think we have almost 14  
3 motions in this case. There's a set of motions to dismiss, and  
4 there's a set of motions for summary judgment. The Court is  
5 going to address all of them. Some of them procedurally relate  
6 to what has been filed or not, but it does seem to me that some  
7 of this can be boiled down to some very basic questions.

8 Ms. Morrison, why don't you come up to the podium  
9 because I have a couple of questions that I'd like to ask you.

10 MS. MORRISON: Okay.

11 THE COURT: Thank you.

12 So, Ms. Morrison, a lot of your amended complaint  
13 focuses on the claim that Mr. Morrison was not HIV positive. I  
14 now have in the record before me multiple tests from his own  
15 doctors, treating doctors, statements from people indicating  
16 that, in fact, he was HIV positive and that he was known to be  
17 HIV positive by himself included starting in 1989.

18 So I'm trying to understand how some of these claims  
19 move forward since your amended complaint basically is founded  
20 on this assumption. You say in the negligence claim, in the  
21 fraud claim, and the negligence misrepresentation claim, and the  
22 slander claims, they are all based upon this fundamental factual  
23 claim that he wasn't HIV positive, that they knew he wasn't HIV  
24 positive, the test results were either incorrect or improper and  
25 that they knew that.

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1           But I have before me now multiple affidavits from  
2 various witnesses, including statements and tests from his own  
3 doctors, which indicate that he was. So I wanted to give you an  
4 opportunity to be able to respond to that because it's hard for  
5 me to imagine how the case moves forward given that repeated  
6 confirmation of that test.

7           MS. MORRISON: Okay.

8           THE COURT: Why don't you pull that microphone in front  
9 of you so we can hear you.

10          MS. MORRISON: Can you hear me?

11          THE COURT: Yes.

12          MS. MORRISON: I completely understand where you're  
13 coming from. My husband, Tommy Morrison, when he passed away,  
14 he did not have the virus in his blood.

15          THE COURT: Okay. But that's not the question I'm  
16 asking you. You've seen these reports --

17          MS. MORRISON: I have.

18          THE COURT: -- from all of these doctors, right,  
19 multiple doctors, some of his own doctors, right, treating  
20 specialists for HIV in New York, doctors in Tulsa, different  
21 doctors who confirm that they received positive test results for  
22 HIV, right. You've seen that?

23          MS. MORRISON: I've seen that, yes.

24          THE COURT: Right. I have not seen anything that would  
25 dispute that, what they've provided.

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1 MS. MORRISON: Right.

2 THE COURT: So why should I not take that into  
3 consideration in the context of dismissing this action? And,  
4 again, whether or not he did or didn't have this in his system  
5 at the time of his death, which I'm not sure how that's verified  
6 given what you've suggested, but given what are your claims in  
7 this case, wouldn't the defendants have at least had a basis for  
8 believing that he, in fact, had HIV and then tested positive  
9 given these results?

10 I mean, why should they not be able to rely upon, one,  
11 the test was performed by Quest, but also there's confirmation  
12 from multiple other doctors? Why isn't that important here?

13 MS. MORRISON: This is very important. This case is  
14 extremely important, and the reason is is that the reports that  
15 you are looking at have been generated by Quest Labs. And on  
16 the actual report you've got maybe one test or two tests. And  
17 very similar to a case that you've just worked on, I think it  
18 was FTC against Health Formulas, there is no actual clinical  
19 study that actually confirms or that the defense have produced  
20 that confirms that that report is actually confirming the human  
21 immune deficiency virus.

22 THE COURT: Wait a minute. They used what were  
23 established CDC protocols and tests. They used a test that was  
24 an algorithm that was created by the CDC, right?

25 MS. MORRISON: No. It's not created by the CDC.

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1 THE COURT: Okay. I'll go back and look at the  
2 affidavit because that's what I thought that it actually said.  
3 That there were a series of screenings and then tests that were  
4 used by Quest.

5 MS. MORRISON: This -- yeah, there's a difference  
6 between a screen and a diagnosis. And the tests that are  
7 actually on the report that have been supplied multiple times,  
8 Quest themselves have said that that's not a diagnosis. You've  
9 got two tests on there. You've got the ELISA test by Abbott,  
10 and you've got also the Western blot test which hasn't been  
11 utilized for years here and also not in the U.K. Both of those  
12 tests do not detect the human immune deficiency virus, which is  
13 a retrovirus.

14 THE COURT: What do they detect then?

15 MS. MORRISON: That, you need to ask Quest.

16 THE COURT: Well, no, I'm asking you because you're  
17 arguing that they don't detect something that they do.

18 MS. MORRISON: Correct.

19 THE COURT: What they detect it appears to be is his  
20 reaction to antibodies. That's what they say. And so the issue  
21 isn't whether or not -- well, I shouldn't say the issue isn't  
22 whether or not -- they detect the virus or not. The issue is,  
23 based upon what was accepted and understood for testing for HIV  
24 in 1996, was this not in fact a reasonable and accepted method  
25 for testing for the virus? Do you have any information to



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1 suggest that it was not an accepted method for testing for HIV  
2 at the time?

3 MS. MORRISON: The test kit companies themselves state  
4 that they do not detect the virus. So if those two tests were  
5 used then, then they should not have been used or performed or  
6 reported by Quest Labs because what the Commission were  
7 requiring, they were requiring for Tommy to show that he did not  
8 have the human immune deficiency virus, which is HIV.

9 THE COURT: Right.

10 MS. MORRISON: Right. So the reason for Quest to  
11 report to the Commission with a report is incorrect because --

12 THE COURT: So what work should they have -- what tests  
13 should they have used?

14 MS. MORRISON: Exactly, what test should they have  
15 used.

16 THE COURT: No, no, no. I'm asking you. Right. The  
17 fact of the matter is, is that they have to use what are the  
18 accepted methods for detecting HIV at the time. Are you saying  
19 that that was not the accepted method or one of the accepted  
20 methods for determining whether or not someone was HIV positive  
21 or not? Are you saying that?

22 MS. MORRISON: I'm saying that, yes, that that is not a  
23 test that detects the virus, and this has been --

24 THE COURT: Ms. Morrison, you're not hearing my  
25 question. What would have been or what test should they have

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1 used that they didn't use that was the appropriate test at that  
2 time?

3 MS. MORRISON: They should have used what Tommy  
4 underwent at Boston Massachusetts General Hospital and also at  
5 the University of Nebraska Medical Center where they draw your  
6 blood and they actually place it under an electron microscope,  
7 just like the inventor did in 1983 to detect if that person has  
8 the virus. Anybody can take an ELISA test or a Western blot  
9 test. That does not detect the virus. It detects proteins, and  
10 anybody with any kind of autoimmune disorder, which does not  
11 stand for AIDS, can actually react to one of the tests that  
12 Quest automatically give people and say and state to the  
13 Commission that this test detects the virus when it does not.

14 And, in fact, there's multiple information in this  
15 lawsuit for two years now where they actually state, This test  
16 does not diagnose, this test is not supposed to be used for  
17 treatment, and this report isn't supposed to be used for  
18 treatment. And, yet, all of these physicians, what are they  
19 looking at, Your Honor? They're looking at that report.

20 THE COURT: So you're saying it wasn't reasonable for  
21 them to rely upon that for making the determination that he was  
22 HIV positive?

23 MS. MORRISON: Correct.

24 THE COURT: And that they had an obligation to produce  
25 that. Now, let me ask you this other question. The other issue

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1 they raise is about the statute of limitations in this case, and  
2 they say the cause of action arose much earlier than when you  
3 filed your complaint and certainly much earlier than when you  
4 became the administrator/executor of the estate. And certainly  
5 in 1997 and certainly as late as 2007 Mr. Morrison himself  
6 questioned the reliability of these tests. So why wouldn't your  
7 claims be barred by the statute of limitations at this point in  
8 time?

9 MS. MORRISON: Because it wasn't until Tommy passed  
10 away and it wasn't until he had that test drawn from his arm in  
11 2012 and 2013 that we actually discovered that he did not have  
12 the human immune deficiency virus, which is a retrovirus, in his  
13 blood, and it was not there. And then at that point I contacted  
14 Dr. Voy, Robert Voy in Las Vegas. And I asked him and I said,  
15 You better have good medical malpractice insurance, Dr. Voy --

16 THE COURT: Hold on just a moment. When were -- when  
17 was the test done exactly?

18 MS. MORRISON: The test was drawn from Tommy's arm on  
19 September 1, 2013.

20 THE COURT: Right.

21 MS. MORRISON: And it was reported back to me on  
22 September 18th, 2013, as confirmation that he did not have the  
23 virus.

24 THE COURT: Right. And when did you become the actual  
25 executor/administrator of the estate?

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1 MS. MORRISON: I processed the papers and I believe  
2 they came through either November or December of 2000...

3 THE COURT: '14.

4 MS. MORRISON: '14, yes.

5 THE COURT: Okay. So one of the arguments is about the  
6 survival statute under Nevada law which creates a one-year  
7 limitations for -- statute of limitations for bringing survival  
8 actions. So, first, why wouldn't you be barred by that statute  
9 under Nevada law given the fact that it would have been known to  
10 you and to your deceased husband as late as 2000 -- I guess you  
11 said September 2013, of the accrual of the action in this case,  
12 but the action was not brought as a survival action until much  
13 later? Why wouldn't there be a statute of limitations issue for  
14 you in the context of bringing this case?

15 MS. MORRISON: All right. Well, there shouldn't be any  
16 issue. They are committing fraud, Your Honor.

17 THE COURT: Okay. That's -- okay. We have to follow  
18 what the statute says in terms of the time frames, right. For  
19 fraud or all -- or other different types of claims, there are  
20 statute of limitations and we have to follow the law as it  
21 relates to them. So that's why I want to make sure I have the  
22 dates correctly to make sure I understand your argument about  
23 why the case shouldn't be barred. Okay.

24 And your husband passed on which day?

25 MS. MORRISON: September 1, 2013.

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1 THE COURT: And you received the results back from the  
2 test later that month, 2013.

3 MS. MORRISON: Correct, September 18th.

4 THE COURT: Okay. And survival actions must be brought  
5 under Nevada law within a year, right?

6 MS. MORRISON: Right. So July 24th, 2014, I filed the  
7 case.

8 THE COURT: Right. But you weren't authorized to file  
9 the case until December 2014, right?

10 MS. MORRISON: As the administrator and the executor of  
11 the estate, yes.

12 THE COURT: Would there have been any other  
13 authorization -- other legal basis for you to bring the case  
14 before that as his wife?

15 MS. MORRISON: I'm sorry. Can you repeat that?

16 THE COURT: Would there have been any other legal basis  
17 for you to bring the case as his wife before you became the  
18 executive of the estate?

19 MS. MORRISON: Well, as far as I know, I was the  
20 surviving spouse.

21 THE COURT: Okay. Okay. Ms. Morrison, let me let the  
22 defendants come up and respond to some of the arguments and  
23 issues you've raised. Thank you.

24 MS. MORRISON: Okay. Thank you.

25 THE COURT: Why don't we have counsel for Quest and

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1 Mr. -- or Dr. -- I'm not sure if I'm pronouncing it correctly.

2 MS. CALDWELL: Hiatt.

3 THE COURT: Hiatt. Is it Ms. Caldwell?

4 MS. CALDWELL: It is Ms. Caldwell. Thank you, Your  
5 Honor.

6 THE COURT: So, Ms. Caldwell, why don't we have you  
7 respond to this argument about the testing for antibodies versus  
8 the virus and clarify your position.

9 MS. CALDWELL: Sure.

10 THE COURT: Because I think some of the confusion here  
11 is in part created by some of the warnings in these test kits  
12 which are not a model of clarity in the context of what it is  
13 that they're testing for.

14 MS. CALDWELL: Okay. Let's talk about, if you mind,  
15 because this is really contained in our expert affidavit of  
16 Dr. Branson with the CDC. Here's the testing. The testing that  
17 was ordered was antibody testing. Under CLIA, that's what Quest  
18 had to perform, and as Dr. Branson said, that was the standard  
19 of care, frankly, in 1996.

20 So there's two types of tests, and it is the algorithm  
21 when Your Honor referred to. And Dr. Branson explains it. So  
22 if -- and this is a little bit different because 1996 was a  
23 little -- we've come a long way since then as far as testing.

24 THE COURT: Right.

25 MS. CALDWELL: There was -- there is screening tests,

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1 immunoassay testing. Okay? And that has -- there's not  
2 warnings, you understand, but there is, In and of itself does  
3 not diagnose. And the point is I'm saying up until about 1993  
4 it was often common for doctors to first order a screen and  
5 independently order the Western blot, not put them together.

6 THE COURT: Right.

7 MS. CALDWELL: There obviously became a recommendation  
8 by the CDC that, No, no. Do them all automatically, reflex  
9 testing.

10 THE COURT: Right. There's three, actually, screens.

11 MS. CALDWELL: Yeah, there's two...

12 THE COURT: Well, I'm sorry. There was the initial  
13 screening, and then there was the Western blot. So you're  
14 saying the three different tests were done differently or just  
15 the two were done differently?

16 MS. CALDWELL: The first screen is done twice.

17 THE COURT: Right. Okay.

18 MS. CALDWELL: So it's repeated to make sure.

19 THE COURT: Right.

20 MS. CALDWELL: Okay. And that was part of the  
21 algorithm. So you do it twice.

22 THE COURT: Right.

23 MS. CALDWELL: And if it is reactive in the terms of  
24 things, you go onto a Western blot.

25 THE COURT: Right.

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1 MS. CALDWELL: Okay. The standard of care in 1996 and  
2 for many, many years when antibody testing was ordered was then  
3 to reflex for what's called the Western blot, which so we're  
4 clear the premarket approvals say that, No, that is indicative.  
5 When done with a reactive screen and Western blot, that's HIV  
6 infection.

7 THE COURT: Right.

8 MS. CALDWELL: Okay. That was the exact test that was  
9 done.

10 THE COURT: Right.

11 MS. CALDWELL: Now, Dr. Branson went on further to say,  
12 to point out that in terms of Mr. Morrison, the idea of having  
13 false positives from that -- first off, they're extraordinarily  
14 rare, and he actually gives the statistics in his affidavit, but  
15 when you have P31 or P32, it's never been known to have a false  
16 positive. So the algorithm was what was ordered, and that's  
17 what was done in 1996 forward.

18 THE COURT: Right.

19 MS. CALDWELL: There were many other tests done, not  
20 all by Quest Diagnostics. The CDC did tests. They did viral  
21 load, which I'll talk about in a minute, to confirm and --

22 THE COURT: Well, I mean, part of that -- I mean, I  
23 asked Ms. Morrison about that, but the fact of the matter is  
24 that actually doesn't matter as much for some of these claims.  
25 The issue really in terms of Quest is what they used and what



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1 they understood and how they reported the information based upon  
2 their own results. Certainly, if there's subsequent  
3 confirmation, that may address some of the issues as relates to  
4 Nevada State Athletic Commission, but I think for Quest it  
5 really comes down to the report that was actually -- the test  
6 was actually done, the report that was provided, and whether or  
7 not in the context of that report there was any sort of fraud or  
8 misrepresentation.

9 MS. CALDWELL: It was not, Your Honor.

10 THE COURT: No, I'm saying that to you because I want  
11 you to focus not on subsequent tests. I'm well aware of how  
12 many other tests were done subsequent, but that doesn't really  
13 matter legally with respect to your clients because really the  
14 claims as asserted with respect to your clients are based upon  
15 what they would have known when they reported the results from  
16 that test. And that's why I want you to sort of focus on that.

17 MS. CALDWELL: Yes.

18 THE COURT: And so what I hear you saying basically,  
19 which is what I read from the affidavit, which is that this was  
20 in fact the standard and accepted method for testing for HIV,  
21 doing this combination of -- I said three screens, but it's  
22 actually, as you indicated, the first screening done twice and  
23 then the subsequent screening done. And that with that  
24 screening and with the results from that screening, it was  
25 accepted that that would have been appropriate then to report an

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1 HIV positive result.

2 MS. CALDWELL: Well, and let me be real clear what was  
3 reported, and it's slightly different, was an HIV-1 positive  
4 Western blot. That's actually if you look at the report itself,  
5 that's what was said. It was the standard of care. And, more  
6 importantly, these are both tests, both the immunoassay and the  
7 Western blot, are FDA approved. They are the tests that were  
8 approved by the federal government to do this exact testing.  
9 Again, obviously this is a preemption issue. It's not in this  
10 case because it's a negligence claim.

11 THE COURT: Right.

12 MS. CALDWELL: But it is -- the FDA says these are the  
13 ones you use. There is no dispute that FDA-approved test kits  
14 were used.

15 THE COURT: Right.

16 MS. CALDWELL: There is no evidence and no allegation  
17 that somehow these approved test kits were used improperly.  
18 There is no allegation of that and no proof of that.

19 It was -- it was a test. It's what the -- frankly,  
20 it's what the ordering physician ordered, and not surprisingly  
21 it's what -- in 1996 it's what everyone ordered.

22 THE COURT: Right.

23 MS. CALDWELL: This is not an unusual. And you have  
24 Dr. Iole, the affidavit, the pathologist who read the Western  
25 blot, and remembers it to this day and says, This is what I did.

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1 I followed the standards. The bands were all there. So, yes,  
2 there is no evidence in this case that, A, that it was not the  
3 standard of care in 1996; B, that it was a breach of the  
4 standard of care for 1996, and Mr. Morrison -- Quest had  
5 received a form saying not only report to his physician, but  
6 please call. Because, again, this comes down to if the call  
7 hadn't been made, Your Honor, Mr. Morrison would not have fought  
8 because one of the requirements was that they had to have a  
9 test. Remember, this is just a couple of hours. Mr. Morrison  
10 had delayed, according to the evidence, giving a sample.

11 THE COURT: Right, for religious reasons initially.

12 MS. CALDWELL: That's what he said originally. That's  
13 what's on there. That's what the evidence is, but then came  
14 back the next day and gave it.

15 Put in a time crunch -- I'll be honest with you, you  
16 give a specimen on Thursday afternoon and you want to fight on  
17 Saturday, you know, there would have not been time. And,  
18 actually, it went to his doctor, as we said, on the 12th because  
19 it would have been a standard electronic reporting.

20 So in order to even have the opportunity to comply,  
21 because obviously you don't know the results when you start out,  
22 the call had to be made or else Mr. Morrison would have not have  
23 completed his requirements, which I'll let Ms. Rakowsky talk  
24 about that. But that's what happened. There's no evidence in  
25 this case about it.

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1           And then of course we get into what Your Honor's  
2 referred to as, you know, later tests, not just this test, but  
3 many other types of tests.

4           THE COURT: Well, and again I referenced them, but  
5 again in terms of the nature of these claims, they really  
6 revolve around the 1996 test before. I mean, they may impact  
7 the statute of limitations, for example, or other aspects of it,  
8 but in terms of the claims involving your client, they focus on  
9 that test that occurred right before the fight was supposed to  
10 take place and whether or not that test was appropriately  
11 administered and whether or not it was even the appropriate  
12 standard of care. Because it seems to me that's the operative  
13 issue for the claims against your client because -- your clients  
14 because, you know, if the answer is yes, then there's a  
15 particular outcome. If the answer's is no, then there's a  
16 different outcome.

17           But I don't know that even though it may be interesting  
18 in terms of the tests later in terms of the claims against your  
19 client, I'm not sure how relevant they are to the legal inquiry  
20 that I have to do about that report.

21           MS. CALDWELL: The exception I would add to that is  
22 that is true as far as the contract claim. There are also other  
23 claims regarding hastening his death, that it caused him to go  
24 into a downward spiral, and this test in fact hastened his death  
25 and caused his death are some of the allegations in the first

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1 amended complaint. And we would urge that --

2 THE COURT: That's true, but they don't really -- none  
3 of them are really stated in the context, for example, of a  
4 malpractice claim or something where I would have to look at  
5 that result.

6 MS. CALDWELL: Yeah.

7 THE COURT: I mean --

8 MS. CALDWELL: For that day.

9 THE COURT: -- you're right. Potentially for  
10 intentional infliction of an emotional distress claim, maybe I  
11 would have to look at that, but it seems to me, again, that the  
12 focus here is really on what's happened in the context of the  
13 case or the facts before the 1996 test.

14 MS. CALDWELL: Yeah. Again, there's simply no -- on  
15 the plaintiff's side no expert testimony or anything to  
16 demonstrate that this was not the standard of care or that the  
17 test was done somehow improperly. There was a breach. But,  
18 yes, as to the pure -- as to the economic damages, you're  
19 absolutely correct, Your Honor.

20 THE COURT: And why don't you address briefly the issue  
21 of the statute of limitations.

22 MS. CALDWELL: Okay.

23 THE COURT: I mean, there are sort of actually a series  
24 of issues here. One has to do with first the survival statute,  
25 but then the other actually has to do with the statute of

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1 limitations in general in terms of the two or three years,  
2 depending upon which claim it is, whether or not they would be  
3 barred in any event given Mr. Morrison's statements even as late  
4 as 2007 saying, I actually questioned those tests or not. So  
5 why don't you address first the survival statute and then the  
6 actual statute of limitations for the various claims.

7 MS. CALDWELL: Well, Your Honor, I think Your Honor  
8 actually pointed out the salient issues on the survival statute  
9 already. It's within one year, and a survival statute cannot be  
10 brought until someone actually had -- is deemed the  
11 administrator of the estate. And that didn't happen for  
12 approximately -- at least 15 months after death. So, yes, we  
13 would urge it was barred, simply application of the survival  
14 statute.

15 And there's no case law that I'm aware of that has a  
16 relation back. And as you recall from the first motion to  
17 dismiss on the original complaint, there was a lot of discussion  
18 because at that point -- over standing and the idea that being a  
19 widow was not sufficient to bring these claims. And we had a  
20 lot of that.

21 THE COURT: Right.

22 MS. CALDWELL: So I won't regurgitate that back to you.  
23 So that the idea that there was some authorization prior to  
24 being named the administrator is not based in Nevada law. And  
25 we -- as the Court found at that point, there was nothing that

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1 would have given Mrs. Morrison the right prior to being named  
2 and, in fact, Your Honor actually dismissed the case until the  
3 proof of standing could be provided.

4 THE COURT: Right.

5 MS. CALDWELL: So that's really -- it's a simple math  
6 application, Your Honor, 15 months accrued. And I'm unaware of  
7 any law that would allow a relation back.

8 THE COURT: Well, but it also seem -- and I guess this  
9 is also your argument that in any event there is a statute of  
10 limitation issue as to when they could have been brought because  
11 Mr. Morrison himself questioned the test in 2007.

12 MS. CALDWELL: Yeah. Well, let me -- let me talk a  
13 little bit about that. First off, and we put this in our brief,  
14 that any knowledge as to an executor is not anything determining  
15 for statute of limitations or a tolling; that actually they step  
16 into the shoes of the decedent. And so what really does matter,  
17 as Your Honor's pointed out, is in fact Mr. Morrison's knowledge  
18 and his application.

19 And the evidence we brought forward, which has been  
20 undisputed, that as early as 1996 he questioned the idea of a --  
21 whether he was HIV positive. He was on notice of all of his  
22 claims. Obviously, he knew he couldn't fight. He knew the  
23 reason. And what was important is the testimony of both his  
24 personal physician who was with him and his publicist/promoter,  
25 Tony Holden, who said that when he was retested, and this is

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1 important for this one, the reason he did that was to find out  
2 if he had a claim against the Commission to see if he did,  
3 obviously, triggering a noticing inquiry. He took notice. He  
4 took the things as early as within it looks four to five days  
5 after 1996. That was one of the reasons why he was retested.

6 THE COURT: What's the longest period of statute of  
7 limitations for any of the claims? I think, is it three years?

8 MS. CALDWELL: There may be a catchall four years. It  
9 was three years that I read, but even on the most broadest  
10 thing, it's four years under the catchall of 11.220. But, no,  
11 it's two years, negligence; two, years defamation; fraud, three  
12 years; intentional interference with contract, three years;  
13 IIED, two years. So, yeah, we're a long ways out of that.

14 And then you go through the history, and again  
15 undisputed evidence is he received treatment for HIV. He knew  
16 he had it. He refused treatment for HIV. He told people he  
17 didn't have HIV.

18 THE COURT: But that was later, right?

19 MS. CALDWELL: Well, that was -- no, starting in 1996  
20 he started to refuse treatment, according to Mr. Holden and  
21 according to the medical records. In 1997 and in 2001 and 2002  
22 he discussed suing the NSAC for failure to issue the license on  
23 the basis of the test. In July 2006 he sent a message to his  
24 second wife saying he was right all along. He never had HIV.  
25 2007 he attempted a come-back, public statements he made



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1 alleging that the 1996 was a false positive and he was not  
2 infected.

3 Mrs. Morrison testified that when she first met him in  
4 2009, still beyond, he told her from the minute that he met her  
5 that it was a false positive.

6 He -- 2009 and 2010 he told Tony Holden that it was a  
7 false positive, that he didn't have HIV. All of which puts him  
8 on inquiry notice. And also, I mean, not just notice, he did  
9 it. He went out and got tested, Your Honor, for the purpose of  
10 finding out if he had a claim.

11 THE COURT: Right.

12 MS. CALDWELL: So -- and so the idea of any delay or  
13 lack of knowledge, it's not -- there is no -- this idea of an  
14 electron microscope, there is no evidence, expert, which is what  
15 would be required in this case, that an electron microscope is  
16 the way one discovers whether it's HIV. So that cannot be a  
17 triggering event, absent expert testimony. Of which there --  
18 the only testimony is Dr. Branson who says no.

19 THE COURT: Okay. Thank you, Ms. Caldwell.

20 Ms. Rakowsky, why don't you come up and just talk to me  
21 a little bit about discretionary immunity.

22 MS. RAKOWSKY: Thank you, Your Honor.

23 THE COURT: If you want to discuss other issues, I  
24 think you can, but I think --

25 MS. RAKOWSKY: I think Ms. Caldwell has discussed them.

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1           Good morning. Discretionary immunity applies to Nevada  
2 State Athletic Commission as well as the claims against  
3 Dr. Goodman as well as the claims against Marc Ratner.  
4 Dr. Goodman and Marc Ratner were sued in their personal  
5 capacities. NRS 241.032, subsection 2, provides immunity for an  
6 officer or an employee of the state or any of the agencies --

7           THE COURT: Ms. Rakowsky, I'm familiar with the  
8 statute.

9           MS. RAKOWSKY: Okay. All right.

10          THE COURT: So you don't need to review that. So,  
11 again, I want to make sure that I understand. Your position is  
12 that based upon the tests that they received and their  
13 understanding of the tests, they made the discretionary choice  
14 as relates to the canceling of the fight in this case.

15          MS. RAKOWSKY: Yes. Nevada uses the same tests that  
16 the federal government does which is the Berkovitz/Gaubert test,  
17 which first asks if the alleged negligent act was done by choice  
18 or discretion of the employee and the second part is whether  
19 that decision was based on policy.

20          THE COURT: So let me ask you this question because it  
21 seemed to me -- now, you have other arguments about dismissal,  
22 but it seems to me that it's not clear to me this is discretion.  
23 The law's pretty clear if you don't provide an appropriate test,  
24 right, you can't fight. So their decision to cancel the fight,  
25 was that really discretionary or wasn't it actually not

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1 compelled by the requirements?

2 And, again, this is not to say you don't have other  
3 arguments to raise with respect to the claims, but it does seem  
4 to me in this case that the actions of these state officials was  
5 not discretionary because once they get -- to get what they  
6 believed to be a positive test, is there anything else that they  
7 can do, besides cancel the fight?

8 MS. RAKOWSKY: Well, the discretion was really in the  
9 licensing issue. The discretion is they must look at the  
10 obligations and the responsibilities of the applicant. The  
11 applicant has a responsibility -- it's just not an HIV test.  
12 There are a number of things.

13 THE COURT: Right, but the HIV test is the focus of the  
14 claim, right. And so, again, I'm not saying that you don't have  
15 other arguments, but my question to you really is about  
16 discretionary-act immunity. They didn't have discretion to  
17 still give him the license once he tested positive, did they?  
18 They didn't have the discretion to allow the fight to go forward  
19 once he had what they believed to be a positive test, did they?

20 MS. RAKOWSKY: That -- I agree with you on that  
21 particular part because he failed to comply with one of the  
22 requirements of the statute and the regulations, but that's --  
23 that is not the true discretion. The discretion is in the  
24 licensing. The discretion is in the decision on what is  
25 necessary for licensing.

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1 THE COURT: No, that's true, but the question -- but  
2 the issue is for an act to be covered, the act itself has to be  
3 discretionary. I don't look at the overall context of how they  
4 make decisions wholistically. I look at the context of the  
5 specific case whether or not the conduct that is at issue was  
6 itself discretionary or not. And so my question to you really  
7 is about the discretionary nature of the acts in this case. And  
8 in this case the decisions were for the fight not to proceed  
9 based upon the fact that he didn't qualify for a license to  
10 fight and meet the requirements, and that those requirements  
11 were strict. In other words, he could not have fought after  
12 testing positive, right. They didn't have the discretion to  
13 say, You can still fight, did they?

14 MS. RAKOWSKY: No, they didn't have that discretion,  
15 but there was a lot of other issues in this case that were based  
16 on their discretion. For example, one of the allegations is how  
17 he was told that he could not fight. There are -- and that was  
18 within his discretion. His discretion was to say he was not  
19 medically cleared to fight. His discretion was not to go to the  
20 press and say that Mr. Morrison can't fight tonight because he  
21 has HIV. No. Instead, Mr. Ratner went to the press and said he  
22 was not medically cleared.

23 So there are a number of discretionary decisions that  
24 are involved in this case that may not come down to exactly the  
25 interpretation of -- and a lot of it should have to do with the

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1 interpretation of the statute. The statute --

2 THE COURT: So let me -- I'm sorry. I don't mean to  
3 interrupt you. So what you are saying is that to the extent  
4 the -- her theory is based upon decisions made about not  
5 providing the license and canceling the fight, they may not be  
6 discretionary. They had to strictly comply with that, but to  
7 the extent that they made a decision in terms of how they told  
8 Mr. Morrison about the results and how they told him how the  
9 fight was going to be cancelled, the timing of when they did  
10 that and going public, those would all have been discretionary  
11 decisions.

12 MS. RAKOWSKY: Right, and they were based on policy.

13 THE COURT: Okay.

14 MS. RAKOWSKY: With respect to -- you know, you could  
15 look at the regulation, and you could say the regulation has to  
16 show that the fighter has the obligation to show that he is not  
17 carrying the HIV virus. I think that's a very clear regulation,  
18 and I think that that is not so much the discretionary thing as  
19 opposed to the entire event of how it was told, of how the fight  
20 was cancelled, of how it was portrayed in the media. And that  
21 was part of the discretionary.

22 THE COURT: Well, no, I'm just trying to distinguish  
23 because I agree with you. I'm just saying that I don't think  
24 discretionary-act immunity covers everything that Ms. Morrison  
25 alleges in the context of the canceling of the fight based upon

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1 their belief that he tested positive. I don't think the  
2 discretionary-act immunity covers that because they have -- they  
3 had to do that once they received the result, but it may cover  
4 other aspects.

5 And, again, it's not to say that you nonetheless can't  
6 rely upon other arguments that you've raised about statute of  
7 limitations or other arguments that have been raised in the  
8 context of what Ms. Caldwell cited, but it is important for me  
9 to be able to make sure that I focus on which acts would be  
10 covered by the discretionary-act immunity and which ones would  
11 not be in the context of deciding this case. So I appreciate  
12 that. Thank you.

13 Do you have anything else you want to add?

14 MS. RAKOWSKY: No, I think Ms. Caldwell covered the  
15 survival statutes completely. Do you have any other questions  
16 for me?

17 THE COURT: I do not. Thank you.

18 MS. RAKOWSKY: Thank you.

19 THE COURT: Ms. Morrison, do you want to respond to  
20 anything that has been said by opposing counsel?

21 MS. MORRISON: Yes, I do.

22 THE COURT: Okay. Sure.

23 MS. MORRISON: Okay. I'd like to respond to  
24 Ms. Caldwell, first of all. The Nevada Commission for their  
25 ruling requests that the boxer provide something that says that

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1 he does not have the human immune deficiency virus. Quest  
2 cannot legally provide that information, and that is because  
3 what they're printing out, Your Honor, is based on the ELISA  
4 test which does not --

5 THE COURT: What about the Western blot test? That  
6 combination --

7 MS. MORRISON: The Western blot --

8 THE COURT: Okay. Let me finish.

9 MS. MORRISON: Yes.

10 THE COURT: I have an expert affidavit, Mr. Branson,  
11 who goes through in significant detail why these tests were used  
12 and what their reliability was and the fact that they were the  
13 standard of care for testing for HIV at the time, that there was  
14 not a requirement for there to be a reviewing of blood samples  
15 under a scan in any way. So I want you to focus -- to the  
16 extent that you want to respond, focus on that affidavit.

17 MS. MORRISON: Right.

18 THE COURT: Because he's very clear about what he says  
19 in there. I don't have anything from you from an affidavit that  
20 I can see that would be equally based upon knowledge of the  
21 regulations and the science at the time that would rebut what he  
22 says. So if you want to attack that, you should attack that  
23 affidavit because that's an affidavit, quite honestly, the Court  
24 finds compelling given his background and expertise. So why  
25 shouldn't I rely upon that?

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1 MS. MORRISON: You should not rely upon that because  
2 Dr. Branson doesn't even list the disclaimers, the limitations,  
3 the intended use of the Western blot test, and neither does he  
4 do that for the ELISA test. The Western blot test is no longer.  
5 They have discovered that that test does not detect or confirm  
6 the virus, and the same goes for the ELISA. Your Honor, if they  
7 were --

8 THE COURT: But the question isn't that. The question  
9 is at the time what was the understood method --

10 MS. MORRISON: Right.

11 THE COURT: -- for testing. If they subsequently  
12 learned that the test was incorrect, that's something that's  
13 different than -- your argument is that at the time they had to  
14 have understood that what they were doing was negligent, because  
15 you can't establish negligence retroactively based upon  
16 information that's subsequently learned, right. It has to be a  
17 breach of the duty of care or misrepresentation based upon  
18 what's known at the time.

19 So I want you to focus on why at the time this would  
20 have been negligent or misrepresenting.

21 MS. MORRISON: At the time nobody was informed of the  
22 disclaimers and intended use inside those package inserts, and I  
23 know you say it's not valid retroactive. At the time in 1996  
24 those tests already contained those disclaimers, already  
25 contained the intended use, and they were not told to the



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1 public. They were not told to Tommy. They probably haven't  
2 even been told to the Nevada Commission. Otherwise, they  
3 wouldn't be requesting an HIV test that does not detect HIV.

4 So there is no statute of limitations as far as I'm  
5 aware of where there's fraud.

6 THE COURT: Well, there is, actually.

7 MS. MORRISON: Oh. Is there?

8 THE COURT: Yes.

9 MS. MORRISON: Okay.

10 THE COURT: And so Nevada law is fairly clear about  
11 when that happens and when these claims can in fact be brought.  
12 And the Court has to determine when the cause of action accrues  
13 to make a decision about whether or not there is a prohibition  
14 on the cause of action. But there are absolutely causes of  
15 action for -- excuse me -- statute of limitations for the claims  
16 that you have raised. And that's why I had asked you about  
17 that.

18 MS. MORRISON: All right.

19 THE COURT: But I understand your point basically is,  
20 if I understand it correctly, is that the providers of the tests  
21 themselves presented caveats and warnings --

22 MS. MORRISON: Yes.

23 THE COURT: -- that Quest disregarded --

24 MS. MORRISON: Yes.

25 THE COURT: -- when they communicated what the results

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1 meant --

2 MS. MORRISON: Yes. Correct.

3 THE COURT: -- to Nevada State Athletic Commission.

4 MS. MORRISON: You've got it, yes. And they still are.

5 And the same goes for all of the other pieces of paper that you

6 see that you've said, Oh, you know, he definitely had HIV

7 because look at all of these reports. Those reports do not mean

8 a diagnosis. Those reports do not mean that you can receive

9 treatment, and that comes directly from Quest themselves.

10 And --

11 THE COURT: But that's something separate. What I am

12 saying is there's a separate issue about the reason why the

13 reports actually matter in terms of what the results were is if

14 your former husband was told repeatedly that he had HIV by

15 various doctors, including his own, if he's questioning the

16 diagnosis, when he questions it or when he decides that there

17 may be an issue is important for me in determining when the

18 statute of limitations may or may not run --

19 MS. MORRISON: Right.

20 THE COURT: -- regarding causes of action. So it does

21 matter in terms of the claims that are raised in this case as to

22 what he was told and when he was told about whether or not he

23 had HIV and how often and who told him that.

24 MS. MORRISON: Right.

25 THE COURT: But I understand your argument basically is

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1 that the Court should rely upon primarily, if I'm understanding  
2 your argument, the very warnings of the test providers  
3 themselves.

4 MS. MORRISON: Yes, correct. And it's not backed up by  
5 any human clinical trials, Your Honor, to say that it does  
6 detect the virus.

7 THE COURT: But, again, that's -- again, Ms. Morrison,  
8 I want to be clear. That's a separate issue. If a test even  
9 detecting for reactive antibodies was the method for testing for  
10 the virus even indirectly, that would be sufficient. So the  
11 issue to me, Ms. Morrison, isn't whether or not there's a test  
12 exactly for the virus itself. The question is whether or not  
13 these reactive tests were deemed to be appropriate and accepted  
14 by the medical community as testing for the virus. Whether they  
15 specifically did or not in terms of what was technically done is  
16 separate from whether or not the medical community at the time  
17 accepted the tests as confirmation of the existence of the virus  
18 in a person. That's two separate things.

19 MS. MORRISON: Right.

20 THE COURT: They don't have to have confirmed the  
21 existence of the virus for the test to have been medically  
22 accepted as a means of confirming the virus. Those are two  
23 separate things.

24 MS. MORRISON: Right. And the manufacturer does not  
25 accept that as being a test that detects the virus. The only

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1 corporation that does is Quest, Quest Diagnostics. And they're  
2 forcing the Commission to accept their lab report as being  
3 confirmation that, Hey, yes, we found the virus or, no, we  
4 didn't. They're forcing the medical establishment to read off  
5 that piece of paper with tests that do not detect the virus.

6 THE COURT: Okay. Thank you, Ms. Morrison.

7 MS. MORRISON: Thank you.

8 THE COURT: Ms. Caldwell, I know you're going to want  
9 to come up and talk to me just a few minutes more.

10 MS. CALDWELL: Sure, Your Honor. Thank you very much.

11 THE COURT: So just talk to me a little bit about the  
12 warnings and what they mean because there is an issue there  
13 about what these warnings say. They do have this very  
14 lawyer-like language about what the results can and can't be  
15 used for. And I think they create at least a legitimate issue  
16 about how the results can be presented. So talk to me about  
17 these inserts and the warnings associated with them.

18 MS. CALDWELL: I'm going to talk to you about two  
19 things, one is Dr. Branson's report and also CLIA, the Clinical  
20 Laboratory Improvement Act, which regulates how reports are  
21 issued. And that's in our briefing. There's not a lot of  
22 discretion, by the way, for laboratories of what they put on  
23 reports and what they don't put on reports. Okay?

24 So, first off, Dr. Branson talks at length about what  
25 he's going to call warnings, and he said first off he disagrees.

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1 They are not warnings. They're not limitations. They talk in  
2 the premarket approval which is -- he refers to this in his  
3 affidavit about the individual tests. And there is no dispute  
4 here that an immunoassay screening on its own would never be a  
5 final laboratory result, very, very clear. It didn't happen in  
6 this case.

7           There are no such warnings that have been brought  
8 forward as to the Western blot and, most importantly, not as to  
9 the algorithm of them, but let's talk a little bit about what  
10 should be on a report because there's been a lot of talk in that  
11 area. And I will point out we have no expert information from  
12 the plaintiffs of what should be on the report or not. We  
13 really are left with Dr. Branson.

14           THE COURT: And with the inserts, that's why I want to  
15 focus on whatever those warnings or not mean in connection with  
16 the reports.

17           MS. CALDWELL: Yeah, but they are not warnings. What  
18 it says, as I understand it, is that -- and these are all  
19 information for the immunoassay done by itself, okay, because  
20 there are warnings -- warnings is probably the wrong word that  
21 Dr. Branson would use, but we'll -- okay. The information given  
22 is, so for an immunoassay, Do not rely upon this solely for a  
23 confirmation of HIV. You get to the Western blot, by the way,  
24 it says the same thing.

25           THE COURT: Right.

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1 MS. CALDWELL: Not the combination, you understand, but  
2 individually used the accepted method in 1996 was to do -- in  
3 other words, it wasn't right to go straight to the Western blot  
4 and call it. It wasn't right to go to the immunoassay. You had  
5 to do them together.

6 So let's talk about who determines it. I know it's  
7 been Quest determines it a lot. Well --

8 THE COURT: Well, no, I didn't say that.

9 MS. CALDWELL: I know. Mrs. Morrison did. I  
10 understand that.

11 THE COURT: But the algorithm actually wasn't created  
12 by Quest. That would be --

13 MS. CALDWELL: Well, it was an FDA issue.

14 THE COURT: Right. You don't have to establish the  
15 fact --

16 MS. CALDWELL: I would also have mentioned --

17 THE COURT: Let me finish.

18 MS. CALDWELL: I'm so sorry, Your Honor. I am so  
19 sorry.

20 THE COURT: That's all right.

21 You don't have to establish, because I understand,  
22 where the algorithm came from, the fact that the algorithm was  
23 used. The only issue for me in this case that potentially  
24 creates an issue for the plaintiff's case are the fact that the  
25 warnings or the statements or the information themselves suggest

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1 that they shouldn't be -- that the tests shouldn't be used for  
2 confirmation. And I understand your argument. I just wanted to  
3 give you a chance to respond to that.

4 MS. CALDWELL: Yeah.

5 THE COURT: That -- let me finish.

6 MS. CALDWELL: Go ahead. I'm sorry.

7 THE COURT: That those information statements or  
8 warnings have to be understood in the context of the tests being  
9 administered individually and not in combination with each  
10 other, and that the algorithm was created to increase the  
11 accuracy of the testing by using the multiple tests together.

12 MS. CALDWELL: And Dr. Branson talks about the idea it  
13 would be inappropriate, inappropriate in tests such was done  
14 here to put any of that information on it. He actually goes the  
15 opposite because it was -- it would lead to, according to FDA  
16 approval and CDC recommendations, to perhaps a physician  
17 inappropriately using a result.

18 THE COURT: Or denying that a result was actually what  
19 it was.

20 MS. CALDWELL: Correct. That would actually be not.  
21 And then you go further. Under the Clinical Laboratory  
22 Improvement Act, it is very specific of what has to be on a test  
23 and it does of course vary by test, but as we have it, for  
24 example, the only information that would be given to a physician  
25 in this case would be -- I don't know the cite, Your Honor, but

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1 would be if the physician had requested in writing to receive  
2 additional information -- and there's no evidence in this case  
3 that the ordering physician ever asked that -- that that would  
4 not be the appropriate, and that would actually violate the  
5 standard of care to have put that information on it.

6 THE COURT: Okay.

7 MS. CALDWELL: And I would -- it's really Dr. Branson  
8 does a much better job of this than I do.

9 THE COURT: Well, no, no, no. Look, again, I wanted to  
10 give you an opportunity. I mean, I've gone through  
11 Dr. Branson's affidavit a few times since it takes a few times  
12 to actually I think understand what he's saying. And I think  
13 part of it is also understanding that the tests aren't for the  
14 virus itself. The tests are for sort of antibody reactions or  
15 proteins or I'm not sure what even the appropriate medical term  
16 would be, but it's to test the body for what would be the body's  
17 reaction to the existence of the virus within the body and  
18 understanding how to measure what those reactions are to be able  
19 to confirm the existence of the virus even if you're not  
20 specifically testing for it.

21 MS. CALDWELL: There are --

22 THE COURT: We wouldn't even be having this discussion  
23 if the test was specific for the existence of the virus or not.  
24 That's obviously why there's even the possibility of a claim  
25 that the tests didn't test for the virus.



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1 But I appreciate your argument, Ms. Caldwell. I don't  
2 know if you have anything further to add than what you've  
3 already added.

4 MS. CALDWELL: I don't think so, Your Honor.

5 THE COURT: All right. Thank you.

6 So let me just deal with a few housekeeping issues in  
7 the context of this case. We have all of these motions that  
8 would need to be addressed in the context of what should or  
9 should not be stricken from the record in this case. You know  
10 what. Actually, what I'll do is I'll just address them in my  
11 written ruling. I think that many of them will be mooted by  
12 whatever I decide in the context of this case. So I don't think  
13 we need to go through them all at this time.

14 So if there's nothing else that we need to do at this  
15 point in time, we are adjourned on this matter. I'm going to  
16 stay on the bench for the next matter. Thank you.

17 MS. CALDWELL: Your Honor, could I ask one thing?

18 THE COURT: Yes.

19 MS. CALDWELL: There is one motion that I would ask the  
20 Court to rule on. I have personally been asked for a motion for  
21 contempt on me for altering records.

22 THE COURT: Yes. Well, I'm going to -- I'll stop you  
23 right there. I'm going to deny that motion. I've reviewed the  
24 record on that motion. I don't find any basis for holding  
25 defense counsel in contempt in this case. I've reviewed the

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1 record. I don't see any basis for that. And so I am going to  
2 deny that motion on the record at this point in time.

3 MS. CALDWELL: Thank you, Your Honor.

4 THE COURT: Okay. And I'll issue a written ruling with  
5 respect to the remaining claims in this case. So we are  
6 adjourned. Thank you.

7 MS. CALDWELL: Thank you.

8 MS. MORRISON: Thank you.

9 MS. RAKOWSKY: Thank you, Your Honor.

10 (Whereupon the proceedings concluded at 10:55 a.m.)

11 --oOo--

12 COURT REPORTER'S CERTIFICATE

13

14 I, PATRICIA L. GANCI, Official Court Reporter, United  
15 States District Court, District of Nevada, Las Vegas, Nevada,  
16 certify that the foregoing is a correct transcript from the  
17 record of proceedings in the above-entitled matter.

18

19 Date: November 7, 2016.

20

/s/ Patricia L. Ganci

21

Patricia L. Ganci, RMR, CRR

22

CCR #937

23

24

25

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

PATRICIA HARDING MORRISON, )  
 individually and in her )  
 capacity as )  
 Executor/Administrator of )  
 the estate of Tommy )  
 Morrison, a deceased )  
 individual, )

Plaintiff, )

vs. )

QUEST DIAGNOSTICS )  
 INCORPORATED, a Nevada )  
 domestic corporation; JON )  
 HIATT, an individual; DR. )  
 MARGARET GOODMAN, an )  
 individual; NEVADA STATE )  
 ATHLETIC COMMISSION, an )  
 unknown business entity; )  
 MARC RATNER, an individual; )

Defendants. )

Case No. 2:14-cv-1207-RFB-PAL

Las Vegas, Nevada

March 1, 2016

9:15 a.m. - 9:41 a.m.

Motion Hearing

TRANSCRIPT OF PROCEEDINGS  
 BEFORE THE HONORABLE PEGGY A. LEEN  
 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

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Proceedings recorded by electronic sound recording, transcript  
 produced by mechanical stenography and computer.

1 APPEARANCES CONTINUED:

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11 For the Defendant Dr. Margaret Goodman:

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16 Recorded by: Jeff Miller  
17  
18  
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20  
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24  
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1 (Tuesday, March 1, 2016, 9:15 a.m.)

2 --oOo--

3 P R O C E E D I N G S

4 COURTROOM ADMINISTRATOR: All rise.

5 THE COURT: Good morning. Please be seated.

6 (Chorus of "Good morning.")

7 COURTROOM ADMINISTRATOR: Your Honor, we are now  
8 calling the motion hearing in the matter of Patricia Harding  
9 Morrison versus Quest Diagnostics Incorporated. The case  
10 number is 2:14-cv-1207-RFB-PAL.

11 Beginning with the plaintiff, parties please state  
12 your names for the record.

13 MS. MORRISON: Good morning. My name is Patricia  
14 Harding Morrison.

15 MS. CALDWELL: I'm Faye Caldwell representing Quest  
16 Diagnostics and Dr. John Hiatt.

17 MR. WEAVER: Good morning. Keith Weaver also for  
18 Quest Diagnostics and Dr. John Hiatt.

19 MS. RADKOWSKY: Good morning, Your Honor. Vivienne  
20 Radkowsky from the Attorney General's Office representing the  
21 Athletic Commission, Dr. Goodman, and Marc Ratner.

22 THE COURT: Okay. This is on calendar on two  
23 separate motions. I know additional motions have been filed  
24 since these two matters were set for hearing. However, they  
25 are not before me this morning, and I frankly don't have time,

1 given the number of other matters on my calendar, to address  
2 them.

3 So the first is with respect to plaintiff's motion  
4 that was filed challenging the subpoenas. She filed an  
5 objection which I construed as a motion to quash. That's the  
6 term that's used by the federal rules, but it basically --

7 MS. MORRISON: I --

8 THE COURT: -- I understood what you were getting at.

9 I required the defendants, who served the 23  
10 subpoenas that were at issue, to supplement their papers to  
11 tell the Court why it is that you believe these 23 individuals  
12 and entities had relevant and discoverable information in this  
13 case. You have now done that.

14 I have reviewed the defendants' responses in that  
15 regard, and I have a number of questions from -- for Quest, and  
16 I'd like some clarification on the record.

17 With respect to a number of these individuals and  
18 entities, you have responded that you obtained Quest records  
19 indicating that a doctor or a medical facility collected  
20 specimens and/or tested the late Mr. Morrison for HIV and/or  
21 other things.

22 And I'd like you to describe for me how it is that  
23 you obtained access to those Quest records that do not deal  
24 with the entity that's been served in this case.

25 MS. CALDWELL: Okay. Your Honor, Quest Diagnostics

1 obviously is a nationwide company, and we had obviously  
2 Mr. Morrison's name and date of birth. And we also knew from,  
3 frankly, Internet research as well as the pleadings in this  
4 matter the likely places where he had lived over the periods of  
5 time. So --

6 THE COURT: You accessed your national database to --

7 MS. CALDWELL: Well, what we actually did is there  
8 are -- under Quest Diagnostics, there are individual lab  
9 locations which all are Quest Diagnostics. And so it is not a  
10 national database. It's a regional or a laboratory-based  
11 database.

12 And we asked those individuals to see if they had  
13 records. I mean, the Quest Diagnostics location. But it is a  
14 Quest Diagnostics location.

15 THE COURT: All right. And so what I'm going to  
16 require you to do is supplement your Rule 26(a)(1) initial  
17 disclosures and serve plaintiff with your supplemental initial  
18 disclosures that disclose each and every Quest lab from whom  
19 you inquired and obtained any indication that medical records  
20 pertaining to Tommy Morrison were available.

21 MS. CALDWELL: We're happy to. We also have copies  
22 today for -- of those individual test records. We didn't know  
23 how the Court wanted to handle confidentiality, so I didn't  
24 want to serve the commission with things that the Court may --  
25 but, absolutely, we'll be happy to do that.

1 THE COURT: No, I --

2 MS. CALDWELL: We did, in our initial disclosures,  
3 indicate we had such records. We did not have it then.

4 THE COURT: Okay.

5 MS. CALDWELL: But we'll do that.

6 THE COURT: Well, I want Miss Morrison to know  
7 exactly who you contacted and exactly from which laboratories  
8 you obtained information. She's entitled to know that. Rule  
9 26(a)(1) requires you to disclose the -- all individuals who  
10 have knowledge that may be used to support claims and defenses,  
11 and you are clearly using this to support your -- your  
12 defenses.

13 And so you're going to have to disclose and provide  
14 the information as required by Rule 26(a)(1) to the plaintiff.  
15 Is there any reason why you can't do that in the next 14 days?

16 MS. CALDWELL: Absolutely not, Your Honor. We'd be  
17 happy to do that.

18 THE COURT: Very well. Then with respect to you have  
19 served Miss Morrison with medical records that you did receive  
20 from a couple of the providers after my January order was  
21 entered requiring you to do so. And you've received some  
22 requests from -- or responses from some other individuals that  
23 they don't have any records, or they used to but they don't  
24 now. And you've now put that in writing, and, of course, are  
25 bound by those responses to the Court.



1           And with respect to some other individuals and  
2           entities, they have responded that they have documents that  
3           have been requested, but that they are waiting for the outcome  
4           of this hearing to determine whether to turn them over to you;  
5           is that correct?

6           MS. CALDWELL: It is. There are some that because we  
7           got the objections, who either were served or we got -- or it  
8           wasn't the right spot, we obviously made no further efforts to.  
9           And those are all indicated here where we obviously didn't go  
10          back and try to go any further once the objection was received.  
11          We told our process server to stop everything.

12          THE COURT: With respect to those who have not been  
13          served, is that the reason is because of the order that I  
14          entered that set this for hearing on the merits?

15          MS. CALDWELL: Yes.

16          THE COURT: And do you -- depending on whether you  
17          are allowed to do so or not, is it your intention to still  
18          serve the other providers that have not yet been served?

19          MS. CALDWELL: If the Court allows it, yes.

20          THE COURT: Well, have you been negotiating with any  
21          of the providers to narrow the scope of the very broad  
22          subpoenas that were served?

23          MS. CALDWELL: We have -- once we got the objection,  
24          we stopped everything, Your Honor. We had -- we had had no  
25          discussion with them prior, and we've had -- about the scope at

1 all. We simply told everyone that there was -- you know, we  
2 would wait until the outcome on it and obviously comply with  
3 the Court's order.

4 THE COURT: Miss --

5 MS. CALDWELL: And we have not had --

6 THE COURT: Miss Morrison believes that you've had  
7 communications with the individual providers following up on  
8 your request; is that true?

9 MS. CALDWELL: They are as listed. The only -- we  
10 have not called. We have received phone calls, like, as was  
11 said in our subpoena, if there was a cost, you know, to contact  
12 my office with the cost.

13 The only contact that -- that our office had of a  
14 substantive nature is after we filed the report to the Court,  
15 we did receive a call -- I received a call from  
16 Dr. Schuchmann's office saying to me of we've received a call  
17 from Mrs. Morrison threatening to sue us, and I -- I didn't say  
18 anything.

19 And they said we had had the objection beforehand.  
20 And I said, "Well, all I can tell you is the Court is going to  
21 have a hearing on this, and, you know, I'm not your attorney."  
22 I didn't say anything further.

23 That is the only -- and that was after the  
24 February 10th report was filed and after we gave the documents.  
25 But other than that, we have had no -- we had no conversations

1 prior, and we didn't -- we've not had -- other than issues of  
2 cost and everyone -- a cost issue that arose, once the  
3 objection was filed, we simply said, "An objection has been  
4 filed. We'll take that up once the Court has a ruling."

5 THE COURT: All right.

6 MS. CALDWELL: I should also point out that the issue  
7 of the other ones, there is apparently -- I got last night,  
8 while I was traveling, an issue of whether we have turned over  
9 all the records for Dr. Schuchmann. Apparently there's a  
10 letter that says there are 23 pages, and we have five.

11 I brought today for the Court and for Mrs. Morrison  
12 the fax that we got showing there were six pages. I -- I don't  
13 know anything else to tell anyone.

14 THE COURT: You know what you received. Whether or  
15 not those are -- Miss Morrison naturally believes that there's  
16 more records especially with respect to the one doctor that --  
17 that treated him up until the time of his death.

18 MS. MORRISON: Correct. Yes. And I've spoken to  
19 them, and I've got something in writing from them that they  
20 sent 23 pages. So --

21 MS. CALDWELL: I brought the original fax. It shows  
22 one of six including the fax cover sheet --

23 THE COURT: Well --

24 MS. CALDWELL: -- and I can give that to the Court  
25 and everyone.

1           THE COURT: First of all, provide it to the  
2 plaintiff. And then Miss Morrison, provide to opposing counsel  
3 the contrary information that you have.

4           Unfortunately, it's not at all uncommon when you deal  
5 with health care providers. It depends on who you get and how  
6 they read the subpoena --

7           MS. MORRISON: Right.

8           THE COURT: -- about what they think is responsive.  
9 It's not at all unusual for an initial response to be made, and  
10 then they go back and say, "No, there are more records," or "We  
11 don't know if you want these or you don't want these." And  
12 they find additional things that they think are responsive to  
13 the subpoena.

14           So, that's -- that's not the entity that serves the  
15 subpoena. It's the entity that receives the subpoena that  
16 sometimes provides conflicting information. So that's not at  
17 all uncommon.

18           MS. MORRISON: Right.

19           THE COURT: And I can understand how that may have  
20 happened. So you need to exchange the information among  
21 yourselves so that you can see if you can get to the bottom of  
22 that --

23           MS. MORRISON: Okay.

24           THE COURT: -- and we'll go from there. With respect  
25 to your request to quash all of these subpoenas, I'm going

1 to -- I have carefully reviewed all of your moving and  
2 responsive papers. I -- I know what you have to say about  
3 this, and I -- I think I have a pretty good handle on what your  
4 position is in this regard. I know you want to keep focusing  
5 this case solely on what happened right around February 10th,  
6 1996.

7 MS. MORRISON: Uh-huh.

8 THE COURT: However, the allegations that you have  
9 raised in the complaint are not limited to that day. I know  
10 your quest is to find -- that's probably -- I didn't select  
11 that word on purpose. Your desire in this case is to find out  
12 who did what on February 10th that resulted in your late  
13 husband not fighting --

14 MS. MORRISON: Right.

15 THE COURT: -- here in Nevada on that date. However,  
16 your complaint allegations are very broad, and you seek damages  
17 up until the time of his death on the theory that what they did  
18 on that day caused a whole series of consequences to occur.  
19 And you have, in the Court's view, put at issue --

20 MS. MORRISON: Uh-huh.

21 THE COURT: -- his medical condition over the years,  
22 and whether he was not fighting, or whether he was not  
23 gainfully employed, or whether he lost certain opportunities  
24 that you are complaining about in your complaint and in your  
25 papers as a result of their conduct or as a result of other

1 things. And as a result, I am not going to quash the  
2 subpoenas.

3 I do admonish the defendants, however, for issuing  
4 extraordinarily overbroad subpoena duces tecum. When you sign  
5 the discovery request, you do so under penalty of Rule 26(g),  
6 which says that it's not unduly burdensome either on the other  
7 side or the party on whom you are serving.

8 And in this case, these are nonparties who -- there  
9 was no temporal limitation whatsoever on these subpoenas in  
10 this case, and that should not occur. If you had information  
11 that you provided to me and on the record now that they had  
12 records over certain periods of time, it was incumbent upon you  
13 to narrow your subpoenas for the period of time in which you  
14 had a reason to believe that you had subpoenas.

15 So they are modified in that I am not going to permit  
16 you to obtain medical records from these various 23 providers  
17 or individual entities for the period of time for which you do  
18 not have a good faith belief that they have relevant and  
19 admissible evidence or relevant and discoverable evidence.

20 And Miss Morrison, those are two different things.  
21 Whether this evidence that they collect ultimately gets in  
22 front of the trial judge or in front of a jury at trial is  
23 different from whether they are entitled to obtain it in the  
24 first instance --

25 MS. MORRISON: Uh-huh.

1 THE COURT: -- to see if it may be admissible. And  
2 so I'm going to allow them to obtain records for the period of  
3 time that they have a good faith belief that the various  
4 individuals and entities have information about your husband's  
5 health, because your late husband's health at various points in  
6 time is at issue in this complaint.

7 But they will be modified so that they are not  
8 open-ended, and they are not permitted to get every piece of  
9 paper that mentions Mr. Morrison's name from 1969 until his  
10 death. So it's -- her objections are sustained to the extent I  
11 am going to modify the subpoenas to a shorter time period and  
12 denied with respect to the request to quash.

13 Turning next to the motion for protective order that  
14 has been filed.

15 MS. CALDWELL: Judge, may I ask a question? We -- to  
16 be fair, I don't want to mislead the Court. There have been  
17 obviously supplemental discovery responses and identification  
18 by Mrs. Morrison of additional providers. And I don't want  
19 to -- it is our intention, if the Court allows us under those  
20 terms to also seek information from the ones we didn't know  
21 about that Mrs. Morrison has identified --

22 THE COURT: Yes.

23 MS. CALDWELL: -- or maybe could take --

24 THE COURT: I have explained that. That I believe  
25 that Mrs. Morrison has put at issue her husband's medical

1 condition over the years beginning in 1996 and up until the  
2 time of his death.

3 MS. CALDWELL: Okay.

4 THE COURT: Because among her allegations is that  
5 what occurred on February 10th, 1996, set into motion a chain  
6 of events that resulted from severe economic consequences and  
7 to a downward spiral of his life. And she believe caused his  
8 premature death in 2013, although she acknowledges some other  
9 doctor apparently did something very wrong --

10 MS. MORRISON: Right.

11 THE COURT: -- as well. So I'm going to permit you  
12 to obtain medical records, because I have found that his  
13 medical condition is at issue from 1996 moving forward. But  
14 what I am telling you is you must tailor any subpoenas that you  
15 serve to the time period that you have reason to believe that  
16 the provider treated him, a reasonable period of time, a year  
17 before, and up until the time of his death. And that's it.  
18 All right?

19 MS. CALDWELL: Thank you, Your Honor.

20 MS. MORRISON: And can I mention something?

21 THE COURT: Yes, Miss Morrison.

22 MS. MORRISON: Okay. I have made a few notes here.  
23 Actually, there was no condition diagnosed on February 10th,  
24 1996.

25 THE COURT: Yes, I understand your position.



1 MS. MORRISON: Okay.

2 THE COURT: I absolutely understand your position  
3 that a test result was not an indication of a diagnosis.

4 MS. MORRISON: Correct.

5 THE COURT: And I clearly --

6 MS. MORRISON: Okay.

7 THE COURT: -- get where you are going at -- going to  
8 there.

9 MS. MORRISON: Okay.

10 THE COURT: However, still, at the end of the day,  
11 the question is going to be was he ill? Was he not ill? Did  
12 he test positive? Did he not test positive?

13 MS. MORRISON: Uh-huh.

14 THE COURT: And those issues are something that they  
15 are entitled to find out about during the discovery process,  
16 and then it will be up to your trial judge to decide what of  
17 the evidence they collect or the materials --

18 MS. MORRISON: Okay.

19 THE COURT: -- that they collect during discovery --

20 MS. MORRISON: Sorry.

21 THE COURT: -- may be admitted in evidence.

22 MS. MORRISON: Okay. Thank you.

23 THE COURT: All right. With respect to the motion  
24 for protective order, I have carefully reviewed your moving and  
25 responsive papers. And I am going to grant the motion for

1 protective order with respect to Mr. Hiatt. And the reason for  
2 that, Miss Morrison, is because he has now answered  
3 interrogatories, under penalty of Rule 26(g), indicating that  
4 he has no -- I'm trying to find my notes, so I -- I wrote it  
5 down.

6 He's answered interrogatories indicating that he was  
7 not involved in the 1996 testing or reporting of Tommy  
8 Morrison's blood specimen and has no personal knowledge or  
9 first-hand knowledge of the alleged events on February 10th,  
10 1996.

11 That testimony is now under oath, and it's subject to  
12 his obligations under Rule 26. And because he has answered  
13 that interrogatory, the request for admissions that are  
14 directed to him that go over some more specifics of the same  
15 subject matter are unduly burdensome and oppressive --

16 MS. MORRISON: Okay.

17 THE COURT: -- where he does not have personal  
18 knowledge or first-hand knowledge. And so his responses in  
19 great detail would be busy work, number one; and, number two,  
20 he would be speculating on the results where he's answered --

21 MS. MORRISON: All right.

22 THE COURT: -- he doesn't know.

23 MS. MORRISON: Okay. Thank you.

24 THE COURT: However, with respect to the request for  
25 admissions that are directed to Quest, I'm going to grant the

1 motion in part and deny the motion in part. Ms. Morrison, some  
2 of your requests -- I know you are a lay person, and you are  
3 doing your best to --

4 MS. MORRISON: Uh-huh.

5 THE COURT: -- frame appropriate requests for  
6 admissions. However, requests for admissions under the Federal  
7 Rules of Civil Procedure are not a discovery device. They are  
8 sought first to facilitate proof with respect to issues that  
9 cannot be eliminated from the case and second to narrow the  
10 issues by eliminating those that can be.

11 Rule 26(a) of the Federal Rules of Civil Procedure --  
12 and frequently in your papers you cite the Nevada Rules of  
13 Civil Procedures. And a lot of times they are very, very  
14 close, because the Nevada rules are patterned after the federal  
15 rules. But there are some differences. And one of those is,  
16 for example, the 15-day notice requirement --

17 MS. MORRISON: Right.

18 THE COURT: -- under Rule 45. The Nevada rule is  
19 different from the Federal Rule 45. But the Federal Rule  
20 36(a), the cases that -- from the Ninth Circuit Court of  
21 Appeals and the cases in this circuit which address Rule 36(a)  
22 say that the rule seeks to serve two important goals; truth  
23 seeking in litigation and efficiency in disbursing justice.  
24 And the purpose is to eliminate from the trial matters as to  
25 which there is no genuine dispute.

1 But some of the -- and the defendants cite this, and  
2 I have cited this in some prior orders in which I have decided  
3 disputes about the appropriateness of requests for admissions  
4 under Rule 36.

5 Some of the greatest scholars in the area are Wright  
6 and Miller on federal practice and procedure. And they note  
7 and the courts have concurred that strictly speaking, Rule 36  
8 is not a discovery procedure at all, since it presupposes that  
9 the party proceeding under it knows the facts or has the  
10 document and merely wishes its opponent to concede their  
11 genuineness.

12 A party who desires to discover what the facts are  
13 should resort to other discovery methods and not to Rule 36 as  
14 an end around the limitations, basically, that the rules  
15 provide for the number of interrogatories that you can  
16 interpose.

17 So I've carefully reviewed each of the requests that  
18 have been served by you, and I am overruling Quest's objections  
19 to certain of them. Certainly she could have better phrased  
20 some of them. Some of them, ma'am, frankly just are  
21 argumentative and compound, and they are very difficult to  
22 follow or understand. And that's not appropriate for a request  
23 for admission.

24 However, I do believe that Quest can and should  
25 comply with its Rule 36 obligations to admit or deny, or admit

1 as much as you can and deny, and state the reasons why you are  
2 unable to admit or deny with respect to Requests for Admissions  
3 No. 4, 5, 6, 12, 14, 15, 20, 21, 22, 25, 26, 28.

4 So you will be compelled to provide responses to  
5 those requests for admissions that are fully compliant with  
6 your obligations under Rule 36. And the motion for protective  
7 order is denied with respect to those but granted with respect  
8 to Hiatt and denied in all other respects.

9 So those are the ones I will enter a written order,  
10 so that you don't have to have these memorized what I just -- I  
11 spent hours going over those papers --

12 MS. MORRISON: Okay.

13 THE COURT: -- and looking at them.

14 MS. MORRISON: Uh-huh.

15 THE COURT: And I have decided that they should have  
16 to -- just like when they were seeking to compel you to  
17 respond --

18 MS. MORRISON: Right.

19 THE COURT: -- to certain other requests, I went over  
20 every single one of them and decided that some of them were  
21 appropriate. Some of them weren't.

22 MS. MORRISON: Uh-huh.

23 THE COURT: And I have now made my rulings, so you --  
24 you will get supplemental responses to your request for  
25 admission. And is there any reason why those requests for

1 admissions for these limited numbers cannot be responded to  
2 within 14 days, Miss Caldwell?

3 MS. CALDWELL: No. 14 days would be fine after we  
4 receive the written order with the numbers, Your Honor.

5 THE COURT: That's --

6 MS. CALDWELL: That will be fine.

7 THE COURT: -- that will be the order. So they will  
8 get 14 -- they need to see the written order.

9 MS. MORRISON: Right.

10 THE COURT: So they -- and I'll try to get that out  
11 later --

12 MS. MORRISON: Do you think you could repeat those  
13 numbers again, just --

14 THE COURT: Yes, ma'am. 4, 5, 6, 12, 14, 15, 20, 21,  
15 22, 25, 26 and 28.

16 MS. MORRISON: Okay. Thank you.

17 THE COURT: So you will get responses to those, and  
18 you will not get responses to the rest.

19 MS. MORRISON: Okay.

20 THE COURT: Very well. So, as I said, I'm aware you  
21 have other motions on calendar that have been filed, but they  
22 are not on calendar today, and I have not had an opportunity.  
23 Some of the replies were just filed yesterday, so --

24 MS. MORRISON: Yes.

25 THE COURT: -- I haven't been able to read those

1 papers. But you will either be set for hearing or I may decide  
2 it just on -- on the papers in a written order.

3 Our local rules of practice permit the Court to  
4 decide matters without oral argument. And depending on whether  
5 I think oral argument is required, I either will or will not  
6 demand oral argument. You are both -- you are located out of  
7 state, ma'am. And counsel for Quest and Hiatt are also  
8 primarily out of state counsel.

9 I do not mind having you appear telephonically so  
10 that you don't have to travel to court on every occasion, as  
11 long as it's a matter that can be done in an orderly way.

12 MS. MORRISON: Thank you.

13 THE COURT: So if you want an opportunity to appear  
14 telephonically, please just file a -- a simple request asking  
15 to appear telephonically once you get a notice of a hearing. I  
16 try to remember to give you an opportunity, and all I ask for  
17 is -- if it's a routine matter -- some things require your  
18 presence.

19 If it's a routine matter, I ask only that if I give  
20 you permission to appear telephonically, that you respect the  
21 fact that because you can't see each other and you can't see  
22 who's talking and --

23 MS. MORRISON: Uh-huh.

24 THE COURT: -- when someone's stopping and when they  
25 are not, that you not interrupt each other, and that you wait

1 until you're called upon to make a statement for the record.  
2 And, of course, any telephonic conferences are on the record  
3 just as all court proceedings are on the record as well. They  
4 are recorded, and at the request of either side, a transcript  
5 may be prepared.

6 MS. MORRISON: Okay.

7 THE COURT: Thank you for being here today, and I  
8 will get to your other motions as soon as I possibly can.

9 MS. CALDWELL: Your Honor, there's only one other  
10 matter that's not on calendar. I don't know how you'd wish us  
11 to address it.

12 Our scheduling order currently, for example, requires  
13 experts to be disclosed by the 10th of March. Obviously, our  
14 experts were planning on using medical records, et cetera. We  
15 obviously have this issue of what is going to be the live  
16 pleading at trial.

17 What would be the proper method you'd like us to sort  
18 of address that subject?

19 THE COURT: Well, you first talk to the other side  
20 about -- you are indicating that you may need additional times  
21 to designate -- additional time to designate your expert,  
22 because your experts be will be opining based on medical  
23 records that you have not yet obtained via subpoena. So, first  
24 confer with Miss Morrison to see -- Miss Morrison, do you  
25 expect to retain an expert in this case?



1 MS. MORRISON: Yes.

2 THE COURT: And in what field, if I may ask, please?

3 MS. MORRISON: In the medical field.

4 THE COURT: Very well.

5 MS. MORRISON: Yes.

6 THE COURT: Do you need any additional time --

7 MS. MORRISON: No.

8 THE COURT: -- in order to designate an expert? And  
9 the Rule 26 requires you to provide a very detailed report.  
10 The expert himself or herself has to prepare the report, and  
11 the Rule 26 outlines in detail what information you are  
12 required to prepare in an expert report.

13 MS. MORRISON: Right.

14 THE COURT: What they're saying is because they don't  
15 have the medical records that they need to get to their expert,  
16 they're not going to be able to comply with the  
17 March 10th deadline.

18 MS. MORRISON: I'm going to take a deep breath here.  
19 They have been complaining about the scheduling all along. I  
20 have emails of them wanting to reschedule everything. I'm  
21 ready for March 10th. And if they are not, that is not my  
22 problem.

23 THE COURT: Very well. So here's what I will require  
24 you to do. File a motion with the Court requesting an  
25 extension of the expert deadline and state with specificity why

1 it is that you think you are entitled to any additional time.

2 Miss Morrison will have an opportunity to respond to  
3 that and file her objection, and then I'll decide.

4 The briefing necessarily is going to exceed the  
5 March 10th deadline, so you are either going to get it or you  
6 are not. And you're going to have to plan accordingly, since  
7 you're raising this for the first time here today.

8 MS. CALDWELL: Thank you, Your Honor. We also have  
9 not -- although we've requested Mrs. Morrison provide us the  
10 deposition dates on several occasions for herself, we have not  
11 yet heard back. We'd also ask that she respond so that we can  
12 schedule that.

13 THE COURT: I'm afraid, ma'am, they are entitled to  
14 take your deposition.

15 MS. MORRISON: Absolutely. Yeah. And I will get my  
16 work schedule actually this week for the dates that they are  
17 requesting. So --

18 THE COURT: Very well.

19 MS. MORRISON: I do plan on emailing her back. Yeah.

20 THE COURT: Thank you. So I ask that you please do  
21 that --

22 MS. MORRISON: Absolutely.

23 THE COURT: -- within the next week to firm up a date  
24 so that your deposition can be taken.

25 MS. MORRISON: Yep.

1 THE COURT: And we'll go from there.

2 MS. MORRISON: Okay. Thank you.

3 THE COURT: Thank you, folks.

4 MS. MORRISON: Is the second amended complaint, is  
5 that one of the motions that's still pending?

6 THE COURT: It is, ma'am.

7 MS. MORRISON: Okay.

8 THE COURT: I saw that you filed it on the last day  
9 for filing a motion to amend the complaint.

10 MS. MORRISON: Right.

11 THE COURT: And the briefing -- some papers were just  
12 filed last night.

13 MS. MORRISON: Yes.

14 THE COURT: And so I haven't looked at that yet.

15 MS. MORRISON: Okay.

16 THE COURT: I looked to see whether the -- your trial  
17 judge referred it to me, and it is.

18 MS. MORRISON: Okay.

19 THE COURT: It's shown as something he wants me to  
20 decide. And so that's one of the motions that's before me as  
21 well as the state filing a motion to require you to disclose a  
22 ghost writer.

23 MS. MORRISON: Yes. That's me.

24 THE COURT: All right.

25 MS. MORRISON: All right.

1           THE COURT: So as soon as the briefing is finished,  
2 I'll do my best to get you a decision as fast as I can. This  
3 is not my only case.

4           MS. MORRISON: I know. I appreciate it.

5           THE COURT: I have about 600 cases, so I do the best  
6 I can to get you as timely a decision as possible, but  
7 sometimes it's -- in federal court, it's hurry up and wait  
8 sometimes.

9           MS. MORRISON: All right.

10          THE COURT: All right.

11          MS. MORRISON: Thank you.

12          THE COURT: Thank you, folks. Good day now.

13          MS. MORRISON: Thank you.

14          MS. CALDWELL: Thank you, Your Honor.

15          (Recess, 9:41 a.m.)  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

--oOo--

TRANSCRIBER'S CERTIFICATE

I, KATHERINE EISMANN, court-approved transcriber, certify  
that the foregoing is a correct transcript from the official  
electronic sound recording of the proceedings in the  
above-entitled matter.

Date: July 8, 2016.

/s/ Katherine Eismann

Katherine Eismann

2:14-cv-01207-RFB-PAL

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF NEVADA

3  
 4 PATRICIA HARDING MORRISON, )  
 individually and in her ) Case No. 2:14-cv-01207-RFB-PAL  
 5 capacity as )  
 Executor/Administrator of ) Las Vegas, Nevada  
 6 the Estate of Tommy ) Monday, September 14, 2015  
 Morrison, a deceased ) 3:16 p.m.  
 7 individual, )

8 Plaintiff, )

) MOTIONS HEARING

9 vs.

10 QUEST DIAGNOSTICS,  
 INCORPORATED, a Nevada  
 11 domestic corporation; JOHN  
 HIATT, an individual; DR.  
 12 MARGARET GOODMAN, an  
 individual; NEVADA STATE  
 13 ATHLETIC COMMISSION, an  
 unknown business entity;  
 14 and MARC RATNER, an  
 individual,

15 Defendants.  
1617  
18 REPORTER'S TRANSCRIPT OF PROCEEDINGS

19 THE HONORABLE RICHARD F. BOULWARE, II,  
 20 UNITED STATES DISTRICT JUDGE

21 APPEARANCES: See Next Page

22  
 23 COURT REPORTER: Patricia L. Ganci, RMR, CRR  
 United States District Court  
 333 Las Vegas Boulevard South, Room 1334  
 24 Las Vegas, Nevada 89101

25 Proceedings reported by machine shorthand, transcript produced  
 by computer-aided transcription.

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1 LAS VEGAS, NEVADA; MONDAY, SEPTEMBER 14, 2015; 3:16 P.M.

2 --oOo--

3 P R O C E E D I N G S

4 THE COURT: Please be seated.

5 COURTROOM ADMINISTRATOR: Now calling Patricia Harding  
6 Morrison versus Quest Diagnostics, Incorporated, et al., Case  
7 No. 2:14-cv-01207-RFB-PAL. This is the time for the hearing  
8 regarding Docket 12, motion to dismiss, and Docket 11, motion to  
9 dismiss regarding complaint.

10 Counsel, please note your appearances for the record.

11 MS. MORRISON: My name is Patricia Harding Morrison.

12 THE COURT: Good afternoon.

13 MS. MORRISON: Good afternoon.

14 MS. CALDWELL: Your Honor, I'm Faye Caldwell for  
15 Defendant Quest Diagnostics and Dr. John Hiatt.

16 THE COURT: Good afternoon.

17 MR. WEAVER: Good afternoon. Keith Weaver for Quest  
18 Diagnostics.

19 THE COURT: Good afternoon.

20 MS. RAKOWSKY: Good afternoon, Your Honor. Vivienne  
21 Rakowsky from the Attorney General's Office for the Nevada State  
22 Athletic Association -- Commission, I'm sorry, Marc Ratner, and  
23 Dr. Margaret Goodman.

24 THE COURT: Good afternoon. Give me a moment here to  
25 pull up my notes.



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1           Okay. What I'm going to do is review some background  
2 facts to talk about what I understand the issues to be in this  
3 case, and then we will have a little discussion about the  
4 different motions that have been filed.

5           Plaintiff Patricia Harding Morrison filed a pro se  
6 complaint in this court on July 24th, 2014. Her complaint  
7 alleges the following facts. Ms. Morrison is the surviving  
8 spouse of Tommy David Morrison, a former heavy-weight boxing  
9 champion. On February 10, 1996, Defendant Quest Diagnostics  
10 produced a laboratory report following a blood test of Tommy  
11 Morrison. Relying on the laboratory report, Quest diagnosed  
12 Tommy Morrison as having the disease, HIV, and reported this  
13 diagnosis to Defendant Nevada State Athletic Commission. Upon  
14 receiving this information, the Commission and Defendant Marc  
15 Ratner also diagnosed Tommy Morrison as having HIV, which  
16 disqualified him from participating in an upcoming boxing match  
17 and caused him to allegedly lose -- caused him to lose a  
18 contract worth more than \$10 million.

19           In 2007, Defendant John Hiatt, an employee of Quest,  
20 retrieved an archived copy of the laboratory report and  
21 confirmed Quest's diagnosis of Tommy Morrison as having HIV.  
22 Hiatt shared this information with the media. Defendant  
23 Dr. Margaret Goodman, an employee of the Commission, also  
24 requested the Quest lab report in 2007. Quest provided this  
25 report and informed Dr. Goodman that the results were ironclad

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1 and unequivocal. Dr. Goodman then informed the media that Tommy  
2 Morrison's diagnosis of HIV had been confirmed.

3 Tommy Morrison died on September 1st, 2013. An autopsy  
4 was performed, and his blood was found to have no evidence of  
5 HIV or AIDS.

6 Construing the complaint liberally, Ms. Morrison  
7 alleges the following causes of action, first, negligence.  
8 Ms. Morrison alleges that the defendants negligently diagnosed  
9 her late husband with HIV when in fact he did not have that  
10 disease. She also states that Quest performed several blood  
11 tests on her husband and that each contained warnings or  
12 disclaimers that they were not to be used as conclusive HIV  
13 tests. Ms. Morrison alleges that Quest ignored these  
14 disclaimers and reported a diagnosis of HIV positive to the  
15 Athletic Commission, which accepted Quest's diagnosis and  
16 treated it as conclusive.

17 The Court also finds that she has sought to allege a  
18 defamation cause of action. Ms. Morrison alleges that  
19 Defendants Hiatt and Goodman informed the media that her husband  
20 was diagnosed with HIV when in fact he did not have that  
21 disease. Ms. Morrison also states that defendants reported the  
22 false diagnosis to the Department of Health and Human Services.

23 Ms. Morrison also appears to allege a HIPPA violation.  
24 Ms. Morrison alleges that Quest released Tommy Morrison's  
25 personal medical information to the Athletic Commission and to

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1 the media without authorization, in violation of the Health  
2 Insurance Portability and Accountability Act of 1996.

3 Ms. Morrison also alleges the defendants' diagnosis of her  
4 husband as having HIV constitutes the unauthorized practice of  
5 medicine as the defendants are either not licensed to practice  
6 medicine or were not his attending physician.

7 Finally, Ms. Morrison alleges that Quest misrepresented  
8 themselves as being physicians capable of diagnosing Tommy  
9 Morrison as HIV positive.

10 The Athletic Commission, Marc Ratner, and Dr. Margaret  
11 Goodman filed a motion to dismiss on October 3rd, 2014. Quest  
12 and John Hiatt also filed a motion to dismiss on the same date.  
13 Ms. Morrison filed a motion for partial summary judgment against  
14 Hiatt on June 5th, 2015, and against Dr. Goodman on July 16th,  
15 2015, and against Quest on August 20th, 2015.

16 Defendants' response to these motions are not due until  
17 the Court has resolved the motions to dismiss and defendants  
18 have filed answers to the complaint. Discovery in this case is  
19 also temporarily stayed until the Court resolves the motions to  
20 dismiss.

21 With respect to the legal standard for a motion to  
22 dismiss, in order to state a claim upon which relief can be  
23 granted, a pleading must contain a short and plain statement of  
24 the claim showing that the pleader is entitled to relief,  
25 pursuant to Federal Rule of Civil Procedure 8(a)(2).

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1           In ruling on a motion to dismiss for a failure to state  
2 a claim, all well pleaded allegations of material fact in the  
3 complaint are accepted as true and are construed in the light  
4 most favorable to the non-moving party. And that's *Faulkner v.*  
5 *ADT Security Services, Incorporated*, 706 F.3d 1017 at 1019  
6 (Ninth Circuit 2013.)

7           To survive a motion to dismiss, a complaint must  
8 contain sufficient factual matter, accepted as true, to state a  
9 claim to relief that is plausible on its face, meaning that the  
10 Court can reasonably infer that the defendant is liable for the  
11 misconduct alleged. That's *Ashcroft v. Iqbal*, 556 U.S. 662 at  
12 678 (2009).

13           So let's talk about the arguments here. In both  
14 motions to dismiss, the defendants argue that the complaint must  
15 be dismissed because Ms. Morrison has not shown that she has  
16 standing to bring this action on behalf of her late husband. So  
17 as I understand it, the argument here is that while the Nevada  
18 Revised Statute would permit an executor or an administrator to  
19 bring a survival action, which is what this is, an heir cannot  
20 bring this claim. An heir can bring a wrongful death claim on  
21 behalf of themselves and also an administrator or an executor  
22 could bring that claim, but not an heir such as Ms. Morrison.  
23 Is that right?

24           MS. CALDWELL: Yes. This is Faye Caldwell for Quest  
25 Diagnostics. Of course, this is not a wrongful death action.

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1 It's a negligence claim. And we believe the law is clear that  
2 the burden is upon the person suing to show that she has  
3 standing to do so, and we cited the cases for that. And to our  
4 knowledge, to date, has not provided the Court with that  
5 information which of course would be her burden under the law to  
6 show that she's the one that should bring these claims.

7 THE COURT: And, Ms. Morrison, you understand the  
8 nature of that argument, right? That basically that the state  
9 law doesn't permit you to bring this claim unless you're either  
10 the executor or an administrator, right, of your late husband's  
11 estate.

12 MS. MORRISON: Right. Yeah. I understand. And a copy  
13 of the executor papers are right here, and a copy is up there at  
14 the bench.

15 THE COURT: Okay. Well, that may address then an issue  
16 with respect to amendment in this case because my reading of the  
17 statute is it would require that. Are you saying, Ms. Morrison,  
18 that you are the executor of her estate?

19 MS. MORRISON: Yes, I am.

20 THE COURT: Okay. Well, Ms. Caldwell, that would seem  
21 to resolve that issue. It doesn't mean that there aren't  
22 substantive issues as it relates to the claims, but is there any  
23 reason why at least with respect to that issue I shouldn't allow  
24 Ms. Morrison to amend her complaint to allege that in fact or to  
25 state in fact that she's the executor?

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1           Now, we can talk about the substantive issues, but in  
2 the context of this particular issue, is there any reason why  
3 you see that I couldn't permit that?

4           MS. CALDWELL: I haven't seen the papers, but of course  
5 not, Your Honor. I mean, if that's true, that's all we've ever  
6 said is not that she was or she wasn't, but she just hadn't  
7 established it. We haven't looked at it and seen it, but of  
8 course.

9           THE COURT: Okay. And I'm sorry. Is it Ms. --  
10 Mr. Weaver and Ms. Rakowsky?

11           MR. WEAVER: Thank you, Your Honor. I'm -- I'll defer  
12 to Ms. Caldwell. We're cocounsel on this. So she can -- she  
13 can more than adequately speak for me as well. Thank you.

14           THE COURT: And I'm going to address the substantive  
15 aspects of the complaint, too, but I wanted -- I mean,  
16 obviously, Ms. Morrison, the reason why this is important  
17 because if you didn't have a standing, basically all of these  
18 claims would have to be dismissed because they're all -- as I  
19 see them, these are all what we call survival actions. They're  
20 not a wrongful death action here that I see. And so that's why  
21 I wanted to address that. As a threshold matter, you'd have to  
22 have that standing. Okay.

23           MS. MORRISON: Right. Yeah, I understand.

24           THE COURT: Okay.

25           MS. RAKOWSKY: And, Your Honor, the State does not

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1 object to Ms. -- to the plaintiff bringing an amendment to the  
2 complaint.

3 THE COURT: Okay. So what I'm going to do is because I  
4 do agree that I think that the Nevada Revised Statute says that  
5 a person -- which is Nevada Revised Statute Section 41.100,  
6 paragraph 1, says: No cause of action is lost by reason of  
7 death of any person, but may be maintained by or against the  
8 person's executor or administrator.

9 I do read that to require that the person must be an  
10 executor or administrator within the definition of the law to be  
11 able to bring a survival action as opposed to a wrongful death  
12 action. And so the Court agrees with the defendants in this  
13 case that that is required by the law. And I think there's a  
14 Ninth Circuit case, while not binding, which also indicates  
15 that, which is the case of Moreland v. Las Vegas Metropolitan  
16 Police Department, 159 F.3d 365 at 370 (Ninth Circuit 1998),  
17 which also indicates that under Nevada law survival actions are  
18 limited to duly appointed representatives of a deceased's  
19 estate.

20 So let me focus then in terms of the leave to amend on  
21 the different claims. Unless you all have further argument, I'm  
22 going to go through my analysis on the different claims and talk  
23 about which ones I think could be potentially amended and some  
24 of them I'm not sure can be amended. And, Ms. Morrison, I may  
25 not permit you to do that in some instances. So I'm going to go

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1 through my analysis on those different claims, unless you all  
2 have something further to add to what you've submitted.

3 MS. CALDWELL: We have nothing further to add on  
4 standing, Your Honor.

5 THE COURT: Ms. Morrison?

6 MS. MORRISON: No, I only just want to say that you can  
7 actually go online to see that I am the executor of my husband,  
8 but I did bring an affidavit here signed if they would like a  
9 copy.

10 THE COURT: Well, no, Ms. Morrison. What the law  
11 really only requires in terms of the pleading is that you  
12 establish you have standing. So, in other words, you have to  
13 allege or say --

14 MS. MORRISON: Right.

15 THE COURT: -- in the complaint that you're the  
16 executor. Right. They don't have any requirement to actually  
17 go and look to determine whether or not you have a right to  
18 bring the survival action. You have an obligation as the person  
19 bringing the suit to allege enough facts in the complaint for  
20 them to be able to know that you have standing.

21 MS. MORRISON: Right.

22 THE COURT: And so it would appear that based upon that  
23 that you may be able to satisfy that requirement. Again, the  
24 Court can't rule upon that and they can't know until they  
25 actually see the documentation, but I'm not requiring you to



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1 produce that in court today. You don't have to provide it to  
2 me. It's not really important to me at this point. It's  
3 important that you indicated that. That way the Court can and  
4 will allow you to amend on that basis certain claims that I  
5 think can be amended. So I'm going to go through my analysis of  
6 the claims themselves.

7           So the Court does find that in this case amendment  
8 would be appropriate given the fact Ms. Morrison is representing  
9 herself and it does appear to be justified based upon what she  
10 stated thus far. And I'll go through each of the different  
11 claims.

12           Here, the Court finds that Ms. Morrison must be given  
13 leave to amend for her negligence, defamation, and fraud claims.  
14 However, Ms. Morrison's claims for a HIPPA violation and for the  
15 unauthorized practice of medicine, the Court does not find can  
16 be cured by amendment. The Court finds for Ms. Morrison to  
17 allege a set of facts that constitute -- excuse me. The Court  
18 finds it possible for Ms. Morrison to allege a set of facts to  
19 constitute claims of negligence and defamation.

20           Now, the defendants have also argued that these claims  
21 are barred by the statute of limitations. While it is true that  
22 the events alleged in 1996 and 2007 are past the limitations  
23 period, the Court does find that Ms. Morrison may be able to  
24 allege facts establishing that the statute of limitations should  
25 be tolled until the autopsy on her late husband revealed that he

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1 did not have HIV. And that's pursuant to Petersen v. Bruen, 792  
2 P.2d 18 at 20 (1990). Under the discovery rule, the statutory  
3 period of limitations is tolled until the injured party  
4 discovers or reasonably should have discovered facts supporting  
5 a cause of action. Therefore, Ms. Morrison's claims are not  
6 necessarily barred at this time by the statute of limitations.

7 Defendants also argue that Ms. Morrison's negligence  
8 claim is barred by the economic loss doctrine. This doctrine  
9 states that generally a plaintiff cannot bring a tort claim for  
10 purely economic losses without any claim of personal injury or  
11 property damage. And that's pursuant to Terracon Consultants  
12 Western, Incorporated versus Mandalay Resort Group, 206 P.3d 81  
13 at 86 (Nevada 2009).

14 Although Ms. Morrison's claims are currently allege --  
15 as currently alleged would be barred by the economic loss  
16 doctrine, the Court finds that Ms. Morrison may be able to  
17 allege additional facts to save her negligence claim.  
18 Therefore, Ms. Morrison shall have leave to amend her negligence  
19 claim.

20 Now, do you understand that, Ms. Morrison? Because I  
21 want to be clear. What I am saying is, is that you have alleged  
22 a negligence claim here. Based upon the economic loss doctrine,  
23 I don't know -- I shouldn't say I don't know. I don't believe  
24 at this point and it is a finding of the Court that it would not  
25 survive the bar under the economic loss doctrine. However,

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1 based upon the facts that you have alleged in the complaint, I'm  
2 going to give you an opportunity to be able to amend your  
3 negligence claim to address this issue.

4 Now, I am not permitted, even though you're  
5 representing yourself pro se, to advise you about how to do  
6 that. I can merely tell you what I've stated here in court,  
7 which is that the economic loss doctrine bars a tort claim for  
8 purely economic losses without any claim of personal injury or  
9 property damage, which the Court finds at this point you have  
10 not alleged appropriately a claim for personal injury or  
11 property damage such that you could overcome the bar based upon  
12 the economic loss doctrine. Do you understand that?

13 MS. MORRISON: Right. Yes.

14 THE COURT: Okay. But I'm going to give you an  
15 opportunity to amend and I'll tell you at the end how much time  
16 you'll have. And you can talk to me about how much time you  
17 think that you need.

18 The Athletic Commission also argues that they are  
19 entitled to discretionary-act immunity under Nevada Revised  
20 Statute 41.032. The discretionary-act immunity doctrine states  
21 that certain governmental officials are immune from suit for  
22 acts or decisions that, one, involve an element of individual  
23 judgment or choice and, two, are based on considerations of  
24 social, economic, or political policy. And that's Martinez v.  
25 Maruszczak, 168 P.3d 720 at 729 (Nevada 2007).

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1           The Court agrees that the Athletic Commission  
2 defendants are likely protected by a discretionary-act immunity  
3 from the claims as currently alleged in the complaint. However,  
4 the Court finds that Ms. Morrison could potentially allege  
5 additional facts showing that the Athletic Commission defendants  
6 made decisions that were not discretionary in nature or were not  
7 based on policy considerations. Therefore, Ms. Morrison's  
8 claims against the Athletic Commission defendants are not  
9 necessarily barred at this time by the discretionary-act  
10 immunity doctrine.

11           Again, what I am saying here, Ms. Morrison, is that I  
12 think that since you are going to amend the complaint, I'm going  
13 to give you an opportunity to be able to allege facts that would  
14 allow you to overcome the discretionary-act immunity that exists  
15 under the law in Nevada.

16           MS. MORRISON: Right.

17           THE COURT: However, I'm not saying right now, and I  
18 don't know that I could say right now, that your complaint as  
19 alleged would survive that, but at this point I'm not going to  
20 reach a final determination because you are going to amend the  
21 complaint anyway. I'm going to give you an opportunity to amend  
22 it as well with respect to the Athletic Commission defendants.

23           MS. MORRISON: Okay. Thank you.

24           THE COURT: Fraud, the Court finds that Ms. Morrison  
25 could potentially allege additional facts in an amended

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1 complaint to meet the elements of fraud and satisfy the  
2 particularity requirement of Federal Rule of Civil Procedure  
3 9(b). Therefore, Ms. Morrison shall have leave to amend her  
4 fraud claim as well.

5 HIPPA violation claim, Ms. Morrison shall not have  
6 leave to amend her HIPPA violation claim because HIPPA itself  
7 does not provide for a private right of action. And that's  
8 pursuant to Webb v. Smart Document Solutions, LLC, 499 F.3d 1078  
9 at 1082 (Ninth Circuit 2007).

10 This means that private citizens are not entitled to  
11 sue in court for violations of the HIPPA statute. This claim,  
12 therefore, is dismissed with prejudice.

13 With respect to Ms. Morrison's claim for the  
14 unauthorized practice of medicine which appears to be asserted  
15 under Nevada Revised Statute 630.400, this statute provides for  
16 criminal penalties for individuals who practice medicine without  
17 a license or present fake documents to the Board of Medical  
18 Examiners. The statute also explicitly authorizes the Board of  
19 Medical Examiners to issue citations, fines, and cease and  
20 desist orders to persons violating the statute.

21 This statute does not contain a private right of  
22 action. There is no ability for private individuals to sue  
23 under this statute. However, the Court is not completely clear  
24 as to the exact claim Ms. Morrison is bringing when she alleges  
25 the defendants engaged in the unauthorized practice of law --

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1 excuse me -- unauthorized practice of medicine. Therefore, this  
2 claim is dismissed with prejudice to the extent it attempts to  
3 state a claim under Nevada Revised Statute 630.400. However,  
4 Ms. Morrison shall have leave to amend if she's not pursuing a  
5 claim under that statute.

6 And what I'm saying, Ms. Morrison, is that I don't  
7 really understand what claim you're making here, but you can't  
8 bring a claim under the Section 630.400. It doesn't create a  
9 private right of action for you to bring a claim as you brought  
10 it here, and so you can't amend your complaint to bring that  
11 type of action. However, if there's some related type cause of  
12 action that I'm not aware of or that you're trying to assert,  
13 I'm not going to stop you from bringing that, but you have to  
14 allege sufficient facts to bring -- to be able to bring that  
15 claim.

16 MS. MORRISON: Okay.

17 THE COURT: Okay?

18 So that means I'm going to grant the motions to dismiss  
19 in part and deny them in part. Okay. And that means that,  
20 Ms. Morrison, the Court is going to order that your complaint be  
21 dismissed without prejudice. You will have leave to amend your  
22 negligence, defamation, and fraud claims. Dismissal is with  
23 prejudice regarding your HIPPA claim and for any unauthorized  
24 practice of medicine claim to the extent it's brought under  
25 Nevada Revised Statute 630.400. You will have 30 days from

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1 today to amend your complaint.

2 The Court is going to lift the discovery stay at this  
3 point in time. A joint copy -- excuse me. A jointly submitted  
4 discovery order will be submitted to the Magistrate Court within  
5 two weeks, and this case will proceed.

6 Are there any questions or inquiries or comments with  
7 respect to the Court's order so far? Ms. Morrison?

8 MS. MORRISON: Do I get a copy of what you just said?

9 THE COURT: What I've said will be available for you to  
10 order it in terms of the transcript of this proceeding. There  
11 will be a minute order which will basically summarize my  
12 findings, but there will not be a written order, other than what  
13 I have read out loud today or discussed today. You can always  
14 order a copy of the transcript --

15 MS. MORRISON: Okay.

16 THE COURT: -- that will discuss that.

17 From the defense side, is anything further that the  
18 Court needs to do today?

19 MS. CALDWELL: No, Your Honor.

20 THE COURT: Okay.

21 MS. RAKOWSKY: No, Your Honor.

22 MR. WEAVER: No, sir.

23 THE COURT: Okay. Just one moment.

24 (Court conferring with law clerk.)

25 THE COURT: So what I think I'm going to do is I will

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1 issue a written order on the motions in part because, otherwise,  
2 you will have to order the transcript which not only can be  
3 expensive, but it can take time if you don't order it on an  
4 expedited basis. And then you'd be asking for more time to  
5 amend, which I don't want to prolong that process anymore  
6 because they need time to be able to respond because I  
7 anticipate that they're going to file a motion to dismiss as  
8 soon as you file your amended complaint.

9 MS. MORRISON: Right.

10 THE COURT: Right, Ms. Caldwell?

11 MS. CALDWELL: We'll have to look at it obviously, but  
12 I think that may be the case.

13 THE COURT: Right. I would be shocked if that didn't  
14 happen. And so I'll issue a written order. That way, you'll  
15 have a copy of the order. Ms. Morrison, you'll have a copy to  
16 be able to assist you in at least understanding further --

17 MS. MORRISON: Okay.

18 THE COURT: -- the Court's order today. And that way,  
19 we don't have to wait for the transcript to be ordered by  
20 Ms. Morrison, although of course you're free to do that if you  
21 want to, but I expect that I'll be able to get the order out  
22 within the next two days.

23 MS. MORRISON: Great. Thank you very much.

24 THE COURT: So that shouldn't be an issue.

25 MS. MORRISON: Thank you.



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1 THE COURT: Is there anything else that we need to do  
2 today? Ms. Morrison?

3 MS. MORRISON: No. Looks like I've got some work to  
4 do. I appreciate your time. Thank you.

5 THE COURT: No. You're welcome.

6 Ms. Caldwell?

7 MS. CALDWELL: No. Nothing, Your Honor. Thank you.

8 THE COURT: Okay. And Mr. Weaver and Ms. Rakowsky?

9 MS. RAKOWSKY: Thank you, Your Honor.

10 MR. WEAVER: Thank you.

11 THE COURT: Okay. Then we are adjourned. Thank you  
12 all. Have a good day.

13 (Whereupon the proceedings concluded at 3:42 p.m.)

14 --oOo--

15 COURT REPORTER'S CERTIFICATE

16  
17 I, PATRICIA L. GANCI, Official Court Reporter, United  
18 States District Court, District of Nevada, Las Vegas, Nevada,  
19 certify that the foregoing is a correct transcript from the  
20 record of proceedings in the above-entitled matter.

21

22 Date: December 15, 2016.

23

/s/ Patricia L. Ganci

24

Patricia L. Ganci, RMR, CRR

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